

# EXHIBIT 6

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

- - -  
In Re: : Chapter 11  
: :  
: Case No.  
W.R. GRACE & CO., et al, : 01-01139 JKF  
: :  
: (Jointly  
Debtors : Administered)

- - -  
Friday, May 15, 2009  
- - -

Oral deposition of DAVID T.  
AUSTERN, ESQUIRE, taken pursuant to  
notice, was held at the offices of ORRICK  
HERRINGTON & SUTCLIFFE, LLP, Columbia  
Center, 1152 15th Street, N.W.,  
Washington, DC 20005-1706, commencing at  
10:07 a.m., on the above date, before  
Lori A. Zabielski, a Registered  
Professional Reporter and Notary Public  
in and for the Commonwealth of  
Pennsylvania.

- - -  
MAGNA LEGAL SERVICES  
Seven Penn Center  
1635 Market Street  
8th Floor  
Philadelphia, Pennsylvania 19103

Page 2

## 1 APPEARANCES:

2  
3 DRINKER BIDDLE & REATH, LLP  
BY: MICHAEL F. BROWN, ESQUIRE4 One Logan Square  
18th & Cherry Streets  
5 Philadelphia, Pennsylvania 19103-6996  
215.988.29886 (brownmf@dbr.com)  
(jeffrey.boerger@dbr.com)  
7 Representing OneBeacon America Insurance  
Company, Seaton Insurance Company,  
8 Government Employees Insurance Company,  
Columbia Insurance Company f/k/a Republic  
9 Insurance Company

10 ORRICK HERRINGTON &amp; SUTCLIFFE, LLP

11 BY: JONATHAN P. GUY, ESQUIRE  
12 ROGER FRANKEL, ESQUIRE  
JOSHUA M. CUTLER, ESQUIRE13 Columbia Center  
1152 15th Street, N.W.  
14 Washington, DC 20005-1706  
202.339.842715 (jguy@orrick.com)  
Representing Future Claimants  
16 Representative17 CAPLIN & DRYSDALE, CHARTERED  
BY: JEFFREY A. LIESEMER, ESQUIRE18 One Thomas Circle, NW  
Suite 1100  
20 Washington, DC 20005  
202.862.5000  
21 (jal@capdale.com)  
Representing Grace, Official Committee of  
22 Asbestos Personal Injury Claimants  
("ACC")

Page 4

## 1 APPEARANCES (continued)

2  
3 VORYS, SATER, SEYMOUR AND PEASE, LLP  
BY: WILLIAM J. POHLMAN, ESQUIRE\*  
4 TIFFANY STRELOW COBB, ESQUIRE\*  
(\*VIA TELECONFERENCE)5 52 East Gay Street  
Columbus, Ohio 43215  
6 614.464.8322  
(wjpholman@vorys.com)  
7 (tscoobb@vorys.com)  
Representing The Scotts Company, LLC8  
9 COHN WHITESELL & GOLDBERG, LLP  
10 BY: CHRISTOPHER M. CANDON, ESQUIRE  
101 Arch Street  
11 Boston, Massachusetts 02110  
617.951.2505  
12 (candon@cwgl1.com)  
Representing the Libby Claimants13  
14 SPEIGHTS & RUNYAN  
15 BY: DANIEL H. SPEIGHTS, ESQUIRE\*  
(\* VIA TELECONFERENCE)  
16 200 Jackson Avenue East  
P.O. Box 685  
17 Hampton, South Carolina 29924  
803.943.4444  
18 (dspeights@speightsrunyan.com)  
Representing Anderson Memorial Hospital19  
20 TUCKER ARENSBERG, P.C.  
21 BY: MICHAEL A. SHINER, ESQUIRE\*  
(\*VIA TELECONFERENCE)  
22 1500 One PPG Place  
Pittsburgh, Pennsylvania 15222  
23 412.594.5586  
(mshiner@tuckerlaw.com)  
24 Representing Certain London Market

Page 3

## 1 APPEARANCES (continued)

2  
3 KIRKLAND & ELLIS, LLP  
BY: THEODORE L. FREEDMAN, ESQUIRE\*  
4 (\*VIA TELECONFERENCE)5 Citigroup Center  
153 East 53rd Street  
New York, New York 10022-4611  
6 212.446.4800  
(theodore.freedman@kirkland.com)  
7 Representing the Debtors8  
9 THE LAW OFFICES OF JANET S. BAER, P.C.  
BY: JANET S. BAER, ESQUIRE10 70 West Madison Street  
Suite 2100  
11 Chicago, Illinois 60602  
312.641.2162  
12 Representing the Debtors13  
14 SIMPSON THACHER & BARTLETT, LLP  
BY: ELISA ALCABES, ESQUIRE15 KAREN E. ABRAVANEL, ESQUIRE\*  
(\*VIA TELECONFERENCE)16 425 Lexington Avenue  
New York, New York 10017-3954  
212.455.3133  
17 (ealcabes@stblaw.com)  
18 (kabravenel@stblaw.com)  
Representing Travelers Casualty and  
Surety Company

Page 5

## 1 APPEARANCES (continued)

2  
3 BILZIN SUMBERG BAENA PRICE & AXELROD, LLP  
BY: MATTHEW I. KRAMER, ESQUIRE\*  
4 (\*VIA TELECONFERENCE)5 200 South Biscayne Boulevard  
Suite 2500  
Miami, Florida 33131-5340  
6 305.450.7246  
(mkramer@bilzin.com)  
7 Representing Property Damage Committee8  
9 STROOCK & STROOCK & LAVAN, LLP  
BY: DANIEL J. HARRIS, ESQUIRE\*  
10 (\*VIA TELECONFERENCE)  
180 Maiden Lane  
11 New York, New York 10038-4982  
212.806.5400  
12 (djharris@stroock.com)  
Representing Official Committee of  
13 Unsecured Creditors14  
15 CROWELL & MORING, LLP  
BY: MARK PLEVIN, ESQUIRE  
16 NOAH S. BLOOMBERG, ESQUIRE  
1001 Pennsylvania Avenue NW  
17 Washington, DC 20004-2595  
202.624.2913  
18 (mplevin@crowell.com)  
(nbloomberg@crowell.com)  
19 Representing Fireman's Fund Insurance  
(Surety Bond)20  
21 STEVENS & LEE, P.C.  
22 BY: JOHN D. DEMMY, ESQUIRE  
1818 Market Street, 29th Floor  
23 Philadelphia, Pennsylvania 19103-1702  
215.751.2885  
24 (jdd@stevenslee.com)

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Page 8

1 APPEARANCES (continued)  
2  
3 ALAN B. RICH LAW OFFICES  
4 BY: ALAN B. RICH, ESQUIRE  
5 Elm Place, Suite 4620  
6 1401 Elm Street  
7 Dallas, Texas 75202  
8 214.744.5100  
9 (arich@alanrichlaw.com)  
10 Representing Property Damage FCR  
11  
12 CONNOLLY BOVE LODGE & HUTZ, LLP  
13 BY: JEFFREY C. WISLER, ESQUIRE  
14 The Nemours Building  
15 1007 North Orange Street  
16 P.O. Box 2207  
17 Wilmington, Delaware 19899  
18 302.88.6528  
19 (jwisler@cblh.com)  
20 Representing Maryland Casualty  
21  
22 ECKERT SEAMANS CHERIN & MELLOTT, LLC  
23 BY: EDWARD J. LONGOSZ, II, ESQUIRE  
24 1747 Pennsylvania Avenue, NW  
12th Floor  
Washington, DC 20006  
202.659.6619  
(elongosz@eckertseamans.com)  
Representing Maryland Casualty and Zurich  
COZEN O'CONNOR  
BY: JACOB C. COHN, ESQUIRE  
1900 Market Street  
Philadelphia, Pennsylvania 19103-3508  
215.665.2147  
(jcohn@cozen.com)  
Representing Federal Insurance Company

1 APPEARANCES (continued)  
2  
3 CUYLER BURK, P.C.  
4 BY: STEFANO V. CALOGERO, ESQUIRE  
5 Parsippany Corporate Center  
6 Four Century Drive  
7 Parsippany, New Jersey 07054  
8 973.734.3200  
9 (scalogero@cuyler.com)  
10 Representing Allstate Insurance Company  
11  
12 GOODWIN PROCTER, LLP  
13 BY: BRIAN H. MUKHERJEE, ESQUIRE\*  
14 (\*VIA TELECONFERENCE)  
15 901 New York Avenue, N.W.  
16 Washington, DC 20001  
17 202.346.4124  
18 (bmukherjee@goodwinprocter.com)  
19 Representing CNA Insurance  
20  
21 WOMBLE CARLYLE SANDRIDGE & RICE, PLLC  
22 BY: KEVIN J. MANGAN, ESQUIRE\*  
23 (\*VIA TELECONFERENCE)  
24 222 Delaware Avenue  
Suite 1501  
Wilmington, Delaware 19801  
302.252.4361  
(kmangan@wcsr.com)  
Representing State of Montana  
PEPPER HAMILTON, LLP  
BY: LINDA J. CASEY, ESQUIRE\*  
(\*VIA TELECONFERENCE)  
3000 Two Logan Square  
Philadelphia, Pennsylvania 19103  
215.981.4000  
(caseyl@pepperlaw.com)  
Representing BNSF Railway Company

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1 ---  
2 PROCEEDINGS  
3 ---  
4 MR. GUY: We will follow the  
5 federal rules.  
6 ---  
7 DAVID T. AUSTERN, ESQUIRE,  
8 after having been first duly  
9 sworn, was examined and testified  
10 as follows:  
11 ---  
12 EXAMINATION  
13 ---  
14 BY MR. BROWN:  
15 Q. Good morning, Mr. Austern.  
16 My name is Michael Brown. I represent  
17 OneBeacon American Insurance Company,  
18 Seaton Insurance Company, GEICO, and  
19 Republic Insurance Company.  
20 Could you state your full  
21 name for the record, please?  
22 A. David Thomas Austern.  
23 Q. Have you ever been deposed  
24 before?

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2 DEPOSITION SUPPORT INDEX  
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1 A. Yes.  
2 Q. How many times?  
3 A. Somewhere between 25 and 30  
4 times.  
5 Q. So it's fair to say that you  
6 are familiar with the protocol for a  
7 deposition then?  
8 A. I am.  
9 Q. Okay. Can you give me a  
10 summary of your professional background?  
11 A. I was an assistant district  
12 attorney in the New York County District  
13 Attorney's Office for four years; I was  
14 an assistant United States attorney in  
15 the United States Attorney's Office in  
16 Washington, D.C. for four years; I was a  
17 law professor for two years; I was in the  
18 private practice of law for something  
19 like 12 years; and I've been general  
20 counsel of the Manville Personal Injury  
21 Settlement Trust, and I have had some  
22 other asbestos matters for the last 21  
23 and a half years. That doesn't add up to  
24 45, and it should, but...

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1 **Q. Those are estimates, I take**  
2 **it?**

3 A. Those are estimates, yes.

4 **Q. What did you do in**  
5 **preparation for today's deposition?**

6 A. I reviewed some documents,  
7 and I spoke to counsel.

8 **Q. What documents did you**  
9 **review?**

10 A. I also reviewed some  
11 transcripts.

12 I reviewed the Personal  
13 Injury Trust Agreement; the Trust  
14 Distribution Process -- the Personal  
15 Injury Trust Distribution Process; the  
16 Transfer Agreement; the Cooperation  
17 Agreement; I reviewed Ms. Biggs' latest  
18 estimation report; Dr. Peterson's latest  
19 report; Dr. Florence's latest report;  
20 Dr. Whitehouse's -- one of  
21 Dr. Whitehouse's reports -- I am sorry --  
22 two of Dr. Whitehouse's reports; the  
23 rebuttal to those reports from Dr. Welsh  
24 and Dr. Freedman; the objections filed by

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1 thing in preparation of the deposition.  
2 I listened to parts of, albeit not all,  
3 of the Lockwood deposition.

4 **Q. Did you meet with counsel in**  
5 **preparation for the deposition?**

6 A. Yes.

7 **Q. When?**

8 A. Last Friday and yesterday.

9 **Q. And for how long last**  
10 **Friday? What period of time did you meet**  
11 **with counsel?**

12 A. I confess I don't remember,  
13 but it was several hours.

14 **Q. And the more recent meeting?**

15 A. I would say three hours.

16 **Q. Was it just counsel for the**  
17 **Future Claimants' Representative or were**  
18 **other Plan proponent counsel present?**

19 A. No. There were no other  
20 Plan proponent counsel.

21 **Q. In reviewing Mr. Lockwood's**  
22 **deposition testimony, was there anything**  
23 **in his transcript with which you**  
24 **disagreed?**

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1 the Libby claimants and by one or more  
2 insurance companies, and I am not sure I  
3 know which ones; my prior deposition in  
4 this case; my prior deposition in the  
5 Combustion Engineering case; my testimony  
6 in the Combustion Engineering case. I  
7 may have left something out, but I think  
8 those are most of the documents I  
9 reviewed.

10 **Q. Okay. And you also**  
11 **mentioned that you had reviewed some**  
12 **transcripts?**

13 A. Those were the depositions  
14 and trial testimony -- oh, excuse me.  
15 Yes. I reviewed Mr. Lockwood's  
16 deposition.

17 **Q. Did you actually review the**  
18 **Amended Plan of Reorganization?**

19 A. Yes -- and excuse me -- and  
20 the Disclosure Statement.

21 **Q. And over what period of time**  
22 **did you review all these materials in**  
23 **preparation for your deposition?**

24 A. Two weeks. I did one other

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1 A. I don't remember -- nothing  
2 occurs to me, although if you showed me a  
3 question and answer, I might say I  
4 disagreed. But I don't recall anything.

5 **Q. Okay. When you listened in**  
6 **on a portion of the deposition, was there**  
7 **anything that you heard by way of an**  
8 **answer by Mr. Lockwood that struck you as**  
9 **inaccurate?**

10 A. Not that I recall.

11 **Q. Okay. Now, you mentioned**  
12 **that you had reviewed the Disclosure**  
13 **Statement, the Plan, the PI Trust**  
14 **Agreement I assume you were referring to,**  
15 **the PI Trust Distribution Procedures, the**  
16 **Transfer Agreement, and the Cooperation**  
17 **Agreement?**

18 A. Yes.

19 **Q. Do you understand all of**  
20 **those documents?**

21 A. No.

22 **Q. Are there particular**  
23 **documents that you understand better than**  
24 **others?**

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Page 20

1 A. Yes.

2 Q. Which ones?

3 A. The Trust Distrubution  
4 Process.

5 Q. By that, you mean the  
6 Asbestos PI Trust Distribution  
7 Procedures?

8 A. Yes, yes.

9 Q. Okay.

10 A. I will refer to it as the  
11 TDP, most likely.

12 Q. We will finish the  
13 deposition a lot sooner if you do that.

14 A. And there were some sections  
15 in some of the other documents I thought  
16 I understood and some sections I thought  
17 I did not.

18 Q. Okay. How about the Trust  
19 Agreement?

20 A. I believe I understood most  
21 of that.

22 Q. Okay. You were appointed by  
23 the bankruptcy court as the, quote, legal  
24 representative, close quote, under

1 FCR? I understand that you were approved  
2 by the bankruptcy court, but how were you  
3 presented, if you will, for that role?

4 A. Understanding I was not in  
5 the case at the time, I can only tell you  
6 what documents I have looked at appear to  
7 say.

8 Q. Okay.

9 A. The Debtor presented to the  
10 court a motion of seeking an appointment  
11 of an FCR, provided the court with three  
12 names and an untitled fourth name -- I  
13 will explain that in a moment. The three  
14 names proposed were me and two other  
15 people, and then a statement that the  
16 Property Damage Representatives didn't  
17 want any of the three names mentioned by  
18 the Debtor and wanted some unnamed fourth  
19 person. So there were four, if you will,  
20 potential choices presented to the  
21 bankruptcy court.

22 Q. Who were the other two named  
23 individuals?

24 A. Professor Eric Green and

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Page 21

1 Section 524(g) of the bankruptcy code,  
2 correct?

3 A. Correct.

4 Q. When did that occur?

5 A. Just about this time of year  
6 five years ago.

7 Q. Okay. So in 2004?

8 A. Yes.

9 Q. And, as I understand it,  
10 under the Plan your title is the asbestos  
11 PI FCR, correct?

12 A. Yes.

13 Q. And the FCR is for Future  
14 Claimants' Representative?

15 A. Yes.

16 Q. You will understand if I  
17 refer to you as the FCR in the  
18 deposition?

19 A. I will understand what the  
20 reference is.

21 Q. Okay. You are a  
22 co-proponent of the Plan, correct?

23 A. Yes.

24 Q. How did you come to be the

1 Dean Trafelet.

2 Q. I gather from your answer  
3 that at the time this occurred, it was  
4 contemplated that there would be a single  
5 asbestos trust that would handle both  
6 personal injury claims and property  
7 damage claims?

8 A. I don't know.

9 Q. Do you have any idea how the  
10 Debtors came up with the three names that  
11 they did?

12 A. I know what they said in  
13 their pleading. They said they had  
14 discussed this matter with, well,  
15 obviously, the Property Damage Trust  
16 Representatives that I mentioned, and  
17 they had discussed it with one or more  
18 Creditors Committees and the Asbestos  
19 Claimants Committee.

20 Q. And then did the bankruptcy  
21 court select you from the list of  
22 contenders for the position?

23 A. Well, I have left out a  
24 pleading.

Page 22

1 **Q. Okay.**

2 A. The Asbestos Claimants  
3 Committee filed a motion, I guess, in  
4 response to the Debtors motion in which  
5 they -- I should back up a step.

6 The Debtors motion had a  
7 chart on it, as I recall, which showed  
8 who opposed various of the names  
9 mentioned and who was in favor of various  
10 of the names mentioned, looking at the  
11 committees. And one of the things that  
12 was said was that the ACC opposed me and  
13 wanted Dean Trafelet. The ACC responded  
14 to that, I believe, saying they did not  
15 oppose me, but they wanted Dean Trafelet  
16 rather than me.

17 **Q. Okay. And did judge**  
18 **Fitzgerald then make a decision based**  
19 **upon the pleadings you just described?**

20 A. I don't know what drove her  
21 decision, but she made a decision and she  
22 selected me.

23 **Q. Okay. Now, did you have the**  
24 **title FCR with respect to other asbestos**

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1 A. So I certainly don't have  
2 that role. I advise the trustees -- I am  
3 the legal advisor to the trustees and  
4 sometimes trust staff.

5 **Q. And what is your role as the**  
6 **FCR for the Combustion Engineering Trust?**

7 A. I represent future  
8 claimants.

9 **Q. Are you familiar with a term**  
10 **"Trust Advisory Committee"?**

11 A. Yes.

12 **Q. Is there a Trust Advisory**  
13 **Committee for the Combustion Engineering**  
14 **Trust?**

15 A. Yes.

16 **Q. And who are its current**  
17 **members?**

18 A. Mr. Cooney, Mr. Weitz,  
19 Mr. Kazan, and there is somebody else.  
20 And I am not sure who it is.

21 **Q. With respect to the**  
22 **Combustion Engineering Trust, did you**  
23 **have the role of future claimants -- let**  
24 **me back up. Strike that.**

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1 trusts?

2 A. Yes.

3 **Q. Which ones? Actually, just**  
4 **for purposes of that question, I want to**  
5 **focus on trusts that are obviously up and**  
6 **running as opposed to ones that may be in**  
7 **the works.**

8 A. One other trust, the  
9 Combustion Engineering Trust.

10 **Q. And then you mentioned**  
11 **earlier that you are the general counsel**  
12 **for the Manville Trust?**

13 A. Yes.

14 **Q. Is your role as the general**  
15 **counsel for the Manville Trust akin to**  
16 **your role as the FCR for the Combustion**  
17 **Engineering Trust?**

18 A. No.

19 **Q. Okay. Can you describe the**  
20 **differences in your roles?**

21 A. Well, first of all, the  
22 Manville Trust has a Futures Claims  
23 Representative.

24 **Q. Okay.**

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1 **Did you have the role of**  
2 **legal representative, as that term is**  
3 **used in Section 524(g) of the bankruptcy**  
4 **code?**

5 A. I believe that was what I  
6 was, yes.

7 **Q. Okay. And were you a**  
8 **co-proponent of the CE Trust --**

9 A. Yes.

10 **Q. The CE Plan?**

11 A. Yes.

12 **Q. Putting aside confirmed**  
13 **plans and trusts that are up and running,**  
14 **are you the designated Future Claimants'**  
15 **Representative in connection with any**  
16 **pending asbestos bankruptcy cases other**  
17 **than the Grace case?**

18 A. No.

19 **Q. Are you familiar with the**  
20 **statutory requirements for a Section**  
21 **524(g) trust?**

22 A. I am generally familiar. I  
23 am not sure I can recall each and every  
24 one right at the moment.



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Page 28

1 Q. You have read Section  
2 524(g)?

3 A. I have.

4 Q. How many times?

5 A. Countless times.

6 Q. Okay. That's what I thought  
7 you would say.

8 Did you play any role in the  
9 drafting or enactment of Section 524(g)?

10 A. I met with some legislators  
11 and the staff of some legislators at the  
12 time it was being proposed.

13 Q. And who were they?

14 A. Senator Heflin, one of  
15 Senator Heflin's legislative assistants,  
16 counsel to Senator Kennedy. There were  
17 some other staff members of some other  
18 senators that I met with. I am not sure  
19 I can recall them.

20 Q. Besides meeting with them,  
21 did you have any input in the provisions  
22 that appear in Section 524(g)?

23 A. I am not sure I know what  
24 you mean by input. I attended --

1 protection in addition to whatever  
2 Section 105 gave us.

3 Q. And what was your rationale  
4 or your response?

5 A. First of all, we couldn't  
6 sell the stock because people,  
7 prospective purchasers were worried about  
8 Section 105 protection, and that came out  
9 again and again in attempts to sell the  
10 stock. I can't think of any other way of  
11 putting it.

12 Q. Okay. Other than what you  
13 have just described, did you have any  
14 other input with respect to Section  
15 524(g)'s enactment?

16 A. No.

17 Q. All right. In this case,  
18 there are actually two Future Claimants'  
19 Representatives, correct?

20 A. Yes.

21 Q. There is the PI FCR and  
22 there is the PD FCR?

23 A. Yes.

24 Q. I want to focus on your role

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1 Q. Let me back up.

2 Did you comment on any  
3 drafts? Did you provide suggestions as  
4 to what the legislation should involve in  
5 terms of requirements for 524(g) trust?

6 A. No.

7 Q. Okay. What was the nature  
8 of your input then?

9 A. I was asked to come answer  
10 questions that they had about the  
11 necessity for 524(g).

12 Q. Okay. And what, if you  
13 recall, did they specifically ask you?

14 A. Well, the Manville Trust, of  
15 course, did not have the benefits of a  
16 524(g) injunction, and it frustrated  
17 somewhat dramatically our ability to sell  
18 our Manville stock, which was a very  
19 large percentage of the assets of the  
20 Trust. And they wanted to know why --  
21 because there was another injunction  
22 under Section 105. They wanted to know  
23 why I thought it would be easier to sell  
24 the Manville stock if we had 524(g)

1 as the PI FCR, obviously, and what I  
2 would like you to do first is to identify  
3 for me the members of the Asbestos PI  
4 Trust Advisory Committee in this case.

5 A. Well, the members --

6 Q. The proposed members, I  
7 should say.

8 A. The members are actually, as  
9 I understand it, individual claimants,  
10 but they are represented by certain  
11 lawyers, who I guess you would say appear  
12 on their behalf. And they are Mr. Budd,  
13 Mr. Cooney, Mr. Weitz, and Mr. Rice.

14 MR. BROWN: Okay. Could you  
15 read my last question?

16 (The reporter read from the  
17 record as requested.)

18 MR. BROWN: Let me back up.  
19 You might have misunderstood my  
20 question, Mr. Austern.

21 BY MR. BROWN:

22 Q. I was asking about the Trust  
23 Advisory Committee as opposed to the  
24 asbestos PI Committee. But let's start

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1 MR. BROWN: I couched it as  
2 does he have an understanding.

3 THE WITNESS: I don't know.

4 BY MR. BROWN:

5 **Q. Do you have an understanding**  
6 **as to whether Section 524(g) of the**  
7 **bankruptcy code requires someone with the**  
8 **title Future Claimants' Representative**  
9 **after a Plan of Reorganization has been**  
10 **confirmed and gone effective?**

11 MR. GUY: Same objection.

12 THE WITNESS: I believe it  
13 does.

14 BY MR. BROWN:

15 **Q. And what is the basis for**  
16 **your belief?**

17 A. Well, my belief is based on  
18 Fibreboard and the decision in Fibreboard  
19 by the Supreme Court. And I don't  
20 remember if I am confusing that with  
21 actually what got into the language of  
22 524(g). But the Supreme Court found  
23 something of a conflict between present  
24 claimants and future claimants, or at

1 **asbestos trust that is up and running**  
2 **that has a two-trust structure, one trust**  
3 **involving PI claims and the other**  
4 **involving PD claims?**

5 A. The answer to the first part  
6 of your question would be yes, but not  
7 because of that division.

8 **Q. Okay. What's the division?**

9 A. Well, I believe that -- I  
10 believe what I refer to as the  
11 Halliburton Trust has a number of  
12 sub-trusts for dispute claims but not the  
13 differentiation as between property  
14 damage and otherwise.

15 **Q. When you say sub-trust, do**  
16 **you mean by that sub-funds within a**  
17 **single trust?**

18 A. Yes.

19 **Q. Okay. As opposed to two**  
20 **distinct trusts?**

21 A. Yes.

22 MR. COHN: Michael, I think  
23 he's referring to silica trust.

24 BY MR. BROWN:

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1 least potential conflicts, and there was  
2 a Future Claims Representative or  
3 essentially a requirement in that case.  
4 And I think it was transferred into  
5 524(g).

6 **Q. If I showed you the language**  
7 **of 524(g), would you be able to tell me**  
8 **where that is set forth?**

9 A. If it's not there, I  
10 wouldn't.

11 **Q. You are not sure whether**  
12 **it's there?**

13 A. That's right.

14 **Q. Okay. The Joint Plan in**  
15 **this case has two trusts, correct?**

16 A. Yes.

17 **Q. It has an Asbestos PI Trust,**  
18 **and it has an Asbestos PD Trust. Why?**

19 A. Well, that's the way the  
20 Plan proponents have done it. My view of  
21 this is that property damage claimants  
22 are different than personal injury  
23 claimants.

24 **Q. Are you aware of any other**

1 **Q. You mentioned the PD claims**  
2 **and PI claims are different. They are**  
3 **actually treated differently under this**  
4 **Joint Plan; are they not?**

5 A. Yes.

6 **Q. Can you describe the**  
7 **difference between asbestos PI claims and**  
8 **asbestos PD claims under the Joint Plan?**

9 A. I can describe the treatment  
10 of personal injury claims; I cannot  
11 describe the treatment of property damage  
12 claims.

13 **Q. Can you describe the**  
14 **differences?**

15 A. No, because I can't...

16 **Q. Do you know whether Section**  
17 **524(g) addresses the propriety of a**  
18 **two-trust structure of bankruptcy?**

19 A. I do not.

20 **Q. Are you familiar with the**  
21 **distinction between the term "demand" as**  
22 **it's used in 524(g) and "claim" as it's**  
23 **used in the bankruptcy code?**

24 A. No.

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1 Q. Do you have any  
2 understanding at all of what a demand is?

3 A. In bankruptcy law, no.

4 Q. Who do you understand to be  
5 your constituency?

6 A. Future claimants.

7 Q. Do you have an understanding  
8 that future claimants are the holders of  
9 future demands?

10 A. I don't know.

11 Q. Do you have an understanding  
12 as to whether the Debtors face the  
13 prospect of any future asbestos PD  
14 demands or asbestos PD claims?

15 A. I believe there are  
16 scenarios in which they do.

17 Q. Could you describe them?

18 A. No, but I believe that there  
19 are property damage claims that -- that  
20 the Debtor is responsible  
21 post-confirmation for certain property  
22 damage claims.

23 Q. And that those property  
24 damage claims would fit within what you

1 today, for which you -- strike that.

2 Are there particular  
3 provisions in the Plan that you don't  
4 understand?

5 A. Yes.

6 Q. Are there any that stick out  
7 in your mind in that regard?

8 A. Can I look at the Plan for a  
9 moment?

10 Q. Sure.

11 A. By way of example, 7.15 of  
12 the document.

13 Q. That's one that you do not  
14 understand?

15 A. Well, it's one I have  
16 trouble trying to understand.

17 Q. You are in good company.

18 A. There are other sections of  
19 the Plan and other documents I reviewed  
20 that address insurance issues, which I  
21 have trouble understanding and rely on  
22 counsel to explain to me.

23 Q. Well, as would have it, 7.15  
24 is an area that I wanted to question you

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1 understand to be a future property damage  
2 claim as opposed to a current property  
3 damage claim?

4 A. I am not sure.

5 Q. All right.

6 MR. BROWN: We will mark  
7 this Austern-3.

8 (Austern-3 marked for  
9 identification at this time.)

10 BY MR. BROWN:

11 Q. Mr. Austern, you have before  
12 you a document that we have marked  
13 Austern-3.

14 My first question is, can  
15 you identify it?

16 A. It's the first Amended Joint  
17 Plan of Reorganization.

18 Q. And this is one of the  
19 documents you indicated previously that  
20 you reviewed in preparation for this  
21 deposition, correct?

22 A. Yes.

23 Q. Are there particular  
24 provisions in the Plan, as you sit here

1 about. So why don't we turn to that  
2 section.

3 A. (Witness complies with  
4 request.)

5 Q. And why don't you take a  
6 moment to review it. It's not terribly  
7 long.

8 MR. GUY: Is there any  
9 particular section, Michael?

10 MR. BROWN: Well, I have  
11 questions about a few sections, so  
12 it might be easiest if he reads  
13 the whole thing.

14 THE WITNESS: Okay. I have  
15 reviewed it.

16 BY MR. BROWN:

17 Q. Okay. Recognizing that you  
18 don't understand it fully, do you have an  
19 idea of what its intended purpose is?

20 A. Its intended purpose, as I  
21 understand it, is to create insurance  
22 neutrality.

23 Q. And what do you understand  
24 insurance neutrality to be?

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1 A. That the Plan does not  
2 interfere with the rights of the  
3 insurance companies.

4 **Q. Okay. Are there any**  
5 **exceptions to that broad statement, as**  
6 **you understand Section 7.15?**

7 MR. COHN: You might want to  
8 rephrase that because you just  
9 changed from his understanding of  
10 insurance neutrality in the broad  
11 concept to a provision that very  
12 clearly is not what it was  
13 announced to be.

14 MR. BROWN: Can you read the  
15 last question?

16 (The reporter read from the  
17 record as requested.)

18 BY MR. BROWN:

19 **Q. You understand Section 7.15**  
20 **to be intended to preserve the insurers'**  
21 **rights; is that a fair statement?**

22 A. Yes.

23 **Q. Okay. Is it your belief**  
24 **that that's what it accomplishes?**

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1 MR. GUY: Objection.

2 MR. LIESEMER: Object to the  
3 form of the question.

4 MR. GUY: It calls for a  
5 legal conclusion. The witness is  
6 a fact witness.

7 MS. BAER: Same objection.

8 THE WITNESS: I am not  
9 positive I know what you mean by  
10 preemptory. You sort of focused  
11 on my problem with 7.15. I don't  
12 know how you read the successive  
13 paragraphs as impacting on each  
14 other.

15 BY MR. BROWN:

16 **Q. Do you believe Section 7.15**  
17 **to be unclear?**

18 A. To me.

19 MR. GUY: Objection.

20 BY MR. BROWN:

21 **Q. Okay. Well, let's explore**  
22 **that a little bit.**

23 **Let's look at Section**  
24 **7.15(b), and you will see that there is a**

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1 A. I don't know.

2 (There was a discussion held  
3 off the record at this time.)

4 BY MR. BROWN:

5 **Q. Mr. Austern, are you**  
6 **familiar with the UNR decision in the**  
7 **Seventh Circuit, the citation to which is**  
8 **942 F.2d 1101?**

9 A. I am familiar with the UNR  
10 Trust. I am not familiar with the  
11 decision.

12 **Q. Are you familiar with what**  
13 **happened in the trial court in the**  
14 **Fuller-Austin coverage case?**

15 MR. GUY: Objection, vague.

16 THE WITNESS: No.

17 BY MR. BROWN:

18 **Q. You said you just read**  
19 **Section 7.15. Let's focus on (a).**

20 **Is your understanding that**  
21 **(a) is a preemptory provision with**  
22 **respect to the Plan, Plan documents, and**  
23 **Confirmation Order except as specifically**  
24 **set forth in Section 7.15?**

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1 **reference in subsection (b) to, quote,**  
2 **the beneficiaries of the Asbestos PI**  
3 **Trust?**

4 **Do you see that?**

5 A. Yes.

6 **Q. Do you have any**  
7 **understanding as to what that means?**

8 A. It means what it states, the  
9 beneficiaries of the Personal Injury  
10 Trust.

11 **Q. And who are they?**

12 A. Well, there are personal  
13 injury claimants obviously, and there  
14 are, under certain circumstances,  
15 indirect personal injury claimants.

16 **Q. Okay. And who do you**  
17 **understand to be within the definition of**  
18 **indirect PI Trust claimants?**

19 A. Entities that can bring  
20 claims as indirect claimants on the  
21 grounds that they have paid dollars that  
22 the Personal Injury Trust should  
23 reimburse them for.

24 **Q. Okay. Are you familiar at**

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1 all with any of the Debtors' pre-petition  
2 settlements with insurance companies?

3 A. I have seen a list, and  
4 that's the extent of my knowledge.

5 Q. Are you aware that at least  
6 certain of those insurers have  
7 contractual indemnity provisions against  
8 the Debtors in those settlement  
9 agreements?

10 A. Can you explain to me what  
11 you mean by contractual?

12 Q. Sure. I will represent to  
13 you that there are settlement agreements  
14 that are pre-petition settlement  
15 agreements in which the insurer paid a  
16 sum of money to the Debtors, and in  
17 exchange for paying that money, the  
18 Debtors agreed to indemnify the insurer  
19 in the event that claims were asserted  
20 against the policy after the settlement  
21 by other parties.

22 A. Third party claimants?

23 Q. Third parties.

24 Do you understand the term

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1 BY MR. BROWN:

2 Q. Okay. Let me parse that  
3 out. Do you understand certain of the  
4 Debtors' insurance companies to have  
5 indirect asbestos PI claims?

6 A. They could. They could have  
7 the right to file them, yes.

8 Q. Okay. And do you understand  
9 those insurers to fit within the phrase  
10 in (b), the beneficiaries of the Asbestos  
11 PI Trust? In other words, are the  
12 insurers that have the contractual  
13 indemnity claims against the Debtors,  
14 quote, beneficiaries of the Asbestos PI  
15 Trust, as that term is used in 7.15(b)?

16 MR. LIESEMER: Object to the  
17 form of the question.

18 MR. GUY: Objection, asked  
19 and answered, compound.

20 MS. BAER: Same objection.

21 MR. GUY: You may answer.

22 THE WITNESS: As far as I  
23 know, they could be under certain  
24 circumstances.

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1 "indirect PI Trust claims" to include the  
2 insurers insofar as they have the type of  
3 contractual indemnity claim that I just  
4 described?

5 MR. LIESEMER: Object to the  
6 form of the question.

7 MR. GUY: Same objection.

8 THE WITNESS: Mr. Brown, I  
9 understand that all asbestos  
10 personal injury insurance has been  
11 channelled to the Asbestos  
12 Personal Injury Trust. And there  
13 are settled insurance companies  
14 that -- how would I describe it --  
15 their obligations have been  
16 settled with the Debtor; there are  
17 unsettled ones; and then there are  
18 those that have coverage in place  
19 agreements or reimbursement  
20 agreements.

21 I don't know where your  
22 question fits into my  
23 understanding of those buckets of  
24 insurance entities.

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1 BY MR. BROWN:

2 Q. All right. Then I would now  
3 like you to compare the language in (a)  
4 and the language in (b) based on the  
5 assumption that they are.

6 MR. GUY: Now I am confused.

7 MR. BROWN: Anyone who reads  
8 this provision is confused.

9 MR. GUY: I am confused.

10 It's talking --

11 THE WITNESS: You are asking  
12 me to compare (a) to (b) or (b) to  
13 (a)?

14 MR. GUY: For what purpose?

15 BY MR. BROWN:

16 Q. If the insurer that I just  
17 described is a beneficiary of the  
18 Asbestos PI Trust, then, according to  
19 (b), it is bound by the Plan, the Plan  
20 documents, and the Confirmation Order,  
21 correct?

22 A. That's what (b) says, yes.

23 Q. So does (b) then supersede  
24 subsection (a)?

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1 A. I don't know.

2 **Q. Let's go to a defined term**  
3 **in the Plan which appears on page 6,**  
4 **number 16, quote, asbestos insurer**  
5 **coverage defenses. Take a moment to**  
6 **review that provision.**

7 MR. GUY: So that I don't  
8 have to repeat it throughout, I am  
9 going to enter a standing  
10 objection. The witness is here  
11 not as a 30(b)(6) witness on  
12 insurer issues, and the Plan says  
13 what it says.

14 MR. BROWN: I understand.

15 MR. COHN: Can you keep your  
16 voice up, Tom?

17 MR. GUY: We will go off the  
18 record.

19 (There was a discussion held  
20 off the record at this time.)

21 BY MR. BROWN:

22 **Q. Have you had a chance to**  
23 **review the definition of asbestos insurer**  
24 **coverage defenses?**

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1 **Q. Okay. My question is, do**  
2 **you have an understanding as to whether**  
3 **the language in 7.15(a) supersedes the**  
4 **language in 11.9?**

5 A. I don't know.

6 **Q. Do you know whether it's**  
7 **intended to?**

8 A. No.

9 **Q. Reading both of those**  
10 **provisions, do you understand whether it**  
11 **does?**

12 MR. GUY: Objection, calls  
13 for a legal conclusion.

14 MR. BROWN: It just calls  
15 for his understanding.

16 THE WITNESS: Mr. Brown, I  
17 must confess to you when I read  
18 11.9 both the first time and the  
19 second time, what I concentrated  
20 on was on the fact that I had  
21 exculpation, and I didn't  
22 concentrate very much more.

23 BY MR. BROWN:

24 **Q. So you have been exculpated**

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1 A. Yes.

2 **Q. Do you understand it?**

3 A. No.

4 **Q. Fair enough. You are not**  
5 **alone.**

6 **Let's get back to 7.15.**

7 A. Can you give me the page  
8 again?

9 **Q. I am sorry. It's page 87.**  
10 **Actually, what I would like to do is I**  
11 **want to do a comparison. Can you also**  
12 **look at Section 11.9? You might want to**  
13 **take a moment to read 11.9.**

14 A. Can you give me a page  
15 number?

16 **Q. Yes. Page 115, Section 11.9**  
17 **entitled Exculpation.**

18 A. Okay.

19 **Q. If you keep that page handy**  
20 **and go back and look at Section 7.15, I**  
21 **will represent to you, feel free to look**  
22 **yourself, that there is no specific**  
23 **reference in 7.15 to Section 11.9.**

24 A. I believe that's correct.

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1 **if the Plan is confirmed?**

2 A. Yes.

3 **Q. Let's just use that as an**  
4 **example, not to pick on you, but since**  
5 **you understand at least that much in**  
6 **11.9.**

7 **Insofar as an insurer had a**  
8 **claim against you, would you still be**  
9 **exculpated in light of Section 7.15 as**  
10 **you understand it?**

11 MR. LIESEMER: Object to the  
12 form of the question.

13 MR. GUY: Objection, calls  
14 for a legal conclusion.

15 THE WITNESS: The first part  
16 of the answer is that in the Trust  
17 Agreement, I also have what is not  
18 labeled as exculpation but  
19 indemnification rights, not  
20 including gross negligence.

21 The answer is I don't know  
22 the answer to that question.

23 BY MR. BROWN:

24 **Q. Does that concern you?**

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1 A. Does a possible conflict of  
2 7.15 to 11.9 concern me?  
3 Q. Well, yes.  
4 A. No.  
5 Q. Okay. Would you go back to  
6 Section 7.7 of the Plan?  
7 A. Did you say 7.7?  
8 Q. Yes. 7.7 entitled  
9 Conditions to Occurrence of the  
10 Confirmation Date.  
11 MR. GUY: What page is that?  
12 MR. BROWN: I am sorry. It  
13 starts on page 69, and there are a  
14 lot of conditions. So it runs to  
15 page 81.  
16 THE WITNESS: Okay.  
17 BY MR. BROWN:  
18 Q. You are free to look at  
19 that, if you want, but I understand you  
20 have already reviewed the Plan.  
21 A. Yes.  
22 Q. My question is, do you have  
23 an understanding as to whether Section  
24 7.15 entitled Insurance Neutrality

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1 preempts Section 7.7 insofar as the  
2 Debtors's insurers are concerned?  
3 MR. GUY: Objection, calls  
4 for a legal conclusion.  
5 THE WITNESS: I don't know.  
6 BY MR. BROWN:  
7 Q. Okay. If you look at  
8 Section 7.8, which begins on page 81,  
9 that one is entitled Conditions to  
10 Occurrence of the Effective Date.  
11 If I asked you the same  
12 question, would your answer be the same  
13 with respect to Section 7.8?  
14 A. Can I look at 7.8 for a  
15 moment?  
16 Q. Sure.  
17 A. I am sorry. Could you  
18 repeat the question?  
19 Q. Let me see if I can rephrase  
20 it. My question is whether the  
21 preemptory language that appears in  
22 Section 7.15(a) preempts the conditions  
23 set forth in Section 7.8, as understand  
24 it?

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1 MR. GUY: Objection.  
2 MR. LIESEMER: I join in  
3 that objection.  
4 MR. GUY: It calls for a  
5 legal conclusion.  
6 THE WITNESS: I don't know.  
7 BY MR. BROWN:  
8 Q. Okay. Can you now look at  
9 7.15(h)?  
10 A. Did you say (e)?  
11 Q. (H). It appears on page 88.  
12 A. Yes.  
13 Q. Do you understand 7.15(h) to  
14 bind all of the Debtors' insurers to all  
15 of the releases and injunctions set forth  
16 in the Plan?  
17 MR. GUY: Objection, calls  
18 for a legal conclusion.  
19 THE WITNESS: I don't know.  
20 BY MR. BROWN:  
21 Q. Let's go to page 97 of the  
22 Plan, Section 8.5 entitled Successor  
23 Claims Injunction.  
24 MR. GUY: When you get to a

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1 point for a break, can we take  
2 one?  
3 MR. BROWN: Why don't we do  
4 that right now.  
5 (There was a break from  
6 11:03 a.m. to 11:13 a.m.)  
7 (The reporter read from the  
8 record as requested.)  
9 BY MR. BROWN:  
10 Q. Mr. Austern, I don't know if  
11 you have had a chance to review that  
12 section during the break, but if not, can  
13 you take a look at it?  
14 A. Yes, I have reviewed this.  
15 Q. Do you have an understanding  
16 as to the purpose of the successor claims  
17 injunction?  
18 MR. LIESEMER: Object to the  
19 form of the question.  
20 THE WITNESS: Well, as its  
21 name implies, it is intended to  
22 enjoin certain conduct. Beyond  
23 that, I, of course, was not part  
24 of this case when either the

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1 Sealed Air or the Fresenius  
2 actions were commenced and  
3 concluded and settled.

4 BY MR. BROWN:

5 **Q. Do you understand the**  
6 **Fresenius indemnified parties and the**  
7 **Sealed Air indemnified parties to be the**  
8 **beneficiaries of the successor claims**  
9 **injunction?**

10 A. I believe they are.

11 **Q. Okay. The successor claims**  
12 **injunction is a 105 injunction, correct?**

13 A. Correct. It's not a 524(g)  
14 injunction.

15 **Q. I gather from your answer**  
16 **that you understand the difference**  
17 **between a Section 105 injunction and a**  
18 **Section 524(g) injunction?**

19 A. To the extent that Manville  
20 had only a Section 105 injunction, yes.

21 **Q. Okay. Do you have an**  
22 **understanding as to whether the successor**  
23 **claims injunction enjoins any claims that**  
4 **are asbestos-related claims?**

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1 **Q. The successor claims**  
2 **injunction by its terms cannot be lifted?**

3 A. It cannot, as I understand  
4 it.

5 **Q. If a claim fits within the**  
6 **definition of the successor claim, as**  
7 **that term is defined in the Plan, do you**  
8 **understand the successor claims**  
9 **injunction to enjoin that claim?**

10 MR. LIESEMER: Object to the  
11 form of the question.

12 MR. GUY: Same objection.

13 MS. BAER: Same objection.

14 THE WITNESS: I don't know.

15 BY MR. BROWN:

16 **Q. Let's turn back for a moment**  
17 **to asbestos PI channelling injunction,**  
18 **page 90, Section 8.2.**

19 A. Okay.

20 **Q. Do you understand the**  
21 **asbestos PI channelling injunction to be**  
22 **purely a 524(g) injunction?**

23 MR. GUY: Objection.

24 THE WITNESS: I don't know.

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1 MR. GUY: Objection, calls  
2 for a legal conclusion.

3 THE WITNESS: Do you mean  
4 asbestos personal injury, or no?

5 BY MR. BROWN:

6 **Q. Could be, or any other type**  
7 **of asbestos-related claim.**

8 A. I am not sure.

9 **Q. Do you understand there to**  
10 **be a problem with using a Section 105**  
11 **injunction to enjoin asbestos-related**  
12 **claims?**

13 MR. GUY: Objection, vague  
14 as to problem.

15 MR. LIESEMER: I join in the  
16 objection.

17 THE WITNESS: There are  
18 certain 105 injunctions that can  
19 be lifted. I assume you cannot do  
20 that with a 524(g) injunction as  
21 it is inexorably intertwined with  
22 the Plan itself. I don't know of  
23 any other distinctions.

24 BY MR. BROWN:

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1 I don't know if it is or not.

2 BY MR. BROWN:

3 **Q. All right. Mr. Austern, I**  
4 **want to shift gears here and turn back to**  
5 **the Asbestos PI Trust Agreement, which we**  
6 **marked as Austern-2. And I would like to**  
7 **direct your attention to Section 6.1.**  
8 **And you are going to want a page.**

9 A. It's 34.

10 **Q. In 6.1, the second sentence**  
11 **says, "He shall serve in a fiduciary**  
12 **capacity, representing the interests of**  
13 **the holders of future PI Trust Claims for**  
14 **the purpose of protecting the rights of**  
15 **such persons."**

16 **Do you see that?**

17 A. Yes.

18 **Q. And the "he" there is you,**  
19 **correct?**

20 A. Yes.

21 **Q. What do you understand your**  
22 **obligations to be to the holders of**  
23 **future PI Trust claims?**

24 A. I represent them, and, as to



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1 form of the question.

2 THE WITNESS: Well, I don't  
3 think 6.1 says "all," but I will  
4 accept the way you phrased it.

5 BY MR. BROWN:

6 Q. Okay.

7 A. I can't think of any  
8 difference, as I sit here now, in terms  
9 of -- it's a different population, but  
10 other than that, I can't I can't think of  
11 any difference.

12 Q. You rightly noted that the  
13 word "all" does not appear in 6.1.

14 Is there any particular  
15 reason for that?

16 A. Not that I know of.

17 Q. Let me ask you a more  
18 general question. What is the purpose of  
19 the TAC?

20 MR. LIESEMER: Object to the  
21 form of the question.

22 THE WITNESS: To advise the  
23 trustees with respect to present  
24 claimants and the operation of the

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1 MS. ALCABES: Page 10.

2 THE WITNESS: Yes.

3 BY MR. BROWN:

4 Q. Why don't you tell me what  
5 the general purpose of the consultation  
6 provisions is for? Well, it's actually  
7 for the TAC and for the Futures'  
8 Representative.

9 A. There are a lot of decisions  
10 trustees have to make. This is  
11 consultation, not carving out consent for  
12 a moment, in terms of investments, in  
13 terms of selecting vendors, in terms of  
14 things that are not in the Trust  
15 Distribution Process, and that  
16 consultation is described in (e).

17 Q. Okay. You mentioned in your  
18 answer the consent provisions.

19 A. There are consent  
20 provisions.

21 Q. And those appear in (f),  
22 correct, on page 11?

23 A. Yes.

24 Q. What is the rationale for

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1 Trust.

2 BY MR. BROWN:

3 Q. And what do you mean by  
4 advise?

5 A. Well, present their views to  
6 the trustees and under some  
7 circumstances, in the Trust Agreement,  
8 either give or do not give their consent  
9 to certain trustee action.

10 Q. Is there a reason why the  
11 TAC members are personal injury asbestos  
12 lawyers?

13 A. I can give you my personal  
14 view.

15 Q. Okay.

16 A. They represent the  
17 beneficiaries of the Trust, and I don't  
18 know who else you would appoint.

19 Q. You are familiar, are you  
20 not, with the consultation provisions  
21 that appear in Section 2.2(e) of the  
22 Trust Agreement, correct?

23 MR. GUY: What page?

24 MR. BROWN: Page 10.

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1 the consent provisions that appear in the  
2 Trust Agreement?

3 A. As distinguished from  
4 consultation?

5 Q. Or as distinguished from not  
6 having them at all?

7 A. As I understand it, there  
8 are certain decisions that trustees make  
9 that are so important, they can only be  
10 made with the consent of both the TAC and  
11 the Future Claims Representative.

12 Q. And that was a negotiated  
13 term of the overall Plan, correct?

14 A. Well, it's been negotiated a  
15 lot before, and I am not sure if any  
16 specific provision was negotiated in this  
17 Plan.

18 Q. Why can't the trustees make  
19 these decisions on their own?

20 MR. GUY: Objection as to  
21 "these decisions."

22 MR. BROWN: Well, let's back  
23 up.

24 BY MR. BROWN:

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1 Q. You will agree with me that  
2 Section 2.2(f) sets forth a number of  
3 different items for which the trustees  
4 need the consent of the TAC and the  
5 Future Claimants' Representative,  
6 correct?

7 A. Yes.

8 Q. It goes on from Romanette 1  
9 to Romanette 15, correct?

10 A. Yes.

11 Q. Why is there a need to have  
12 the consent of the Future Claimants'  
13 Representative and the TAC on these  
14 particular items rather than simply  
15 consultation?

16 A. My answer is the same, and I  
17 will speak forgetting the TAC, as the  
18 Future Claimants' Representative, I want  
19 the right to under certain circumstances  
20 not agree to a decision by the trustees  
21 and have that be the end of the decision.

22 Q. Well, it's not actually the  
23 end of the decision, is it?

24 A. No. There are ways of

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1 list of them.

2 A. Dean Trafelet, Lewis  
3 Sifford, and Harry Huge.

4 Q. And do you know each of  
5 those gentlemen?

6 A. Well, in the case of  
7 Mr. Huge and Mr. Trafelet, I do know  
8 them. In the case of Mr. Sifford, I have  
9 met him on a number of occasions.

10 Q. Okay. What is the  
11 professional background of Mr. Huge?

12 A. Let's see. I first met him  
13 about 40 years ago at the Justice  
14 Department. I am sorry. He is a lawyer.  
15 He has been with the government. He has  
16 been in private practice. Do you want  
17 more?

18 Q. Does he have experience with  
19 asbestos trusts?

20 A. Yes, he does.

21 Q. What is that experience?

22 A. He is a trustee of Armstrong  
23 and I believe a trustee of OCF.

24 Q. How long has he had the role

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1 resolving that difference.

2 Q. And what are those?

3 A. Well, I may confuse this  
4 with the Manville Trust, but you can  
5 seek, shall we say, guidance from the  
6 bankruptcy court.

7 Q. By that, you mean a ruling?

8 A. Yes, yes.

9 Q. If your consent has been  
10 unreasonably withheld in the views of the  
11 trustees?

12 A. That's correct.

13 Q. Is there anything in Section  
14 524(g) to your knowledge that requires a  
15 Trust, an asbestos Trust, to have a  
16 consultation and consent provisions that  
17 are set forth in this Trust Agreement?

18 A. I do not know of anything in  
19 524(g) like that.

20 Q. Do you know who the  
21 designated trustees are for the Asbestos  
22 PI Trust?

23 A. Yes.

24 Q. Okay. Who are they? Or

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1 of trustee in Armstrong?

2 A. I met with him shortly after  
3 he was appointed, and I should be able to  
4 remember that. I think four or five  
5 years.

6 Q. And how about as a trustee  
7 in OCF?

8 A. I don't know.

9 Q. Okay. Why don't you tell me  
10 what the professional background of  
11 Mr. Sifford is?

12 A. I know him less well.  
13 Mr. Sifford is a practicing lawyer in a  
14 law firm, and he is an Armstrong trustee,  
15 I believe. And that's, I believe, the  
16 first time I met him, and thus I looked  
17 him up. And according to  
18 Martindale-Hubbell, he does both personal  
19 injury plaintiff's work and personal  
20 injury defense work. I am getting close  
21 to exhausting my knowledge of him.

22 Q. Okay. Is the personal  
23 injury work that he does, both defense  
24 and plaintiff's work, asbestos-related?

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1 A. It is not as far as I know.

2 Q. Do you know what it does  
3 relate to?

4 A. No.

5 Q. Okay. Do you know how long  
6 he has been a trustee of the Armstrong  
7 Trust?

8 A. The same period of time  
9 Mr. Huge has been, but I don't remember  
10 when that started.

11 Q. I thought you said that one  
12 was four to five years ago?

13 A. Four to five years ago. I  
14 don't remember exactly.

15 Q. All right. And what is the  
16 professional background of Mr. Trafelet?

17 A. Before I get to that, let me  
18 explain. Armstrong was confirmed, and  
19 for a long time, there was no activity  
20 for reasons that allude me. So I can't  
21 remember exactly when I got involved in  
22 talking to those people.

23 Q. Okay.

24 A. Mr. Trafelet is a lawyer who

1 Q. And would I be correct that  
2 he's been that for four or five years?

3 A. Yes.

4 Q. Let's go to Section 4.9 of  
5 the Trust Agreement. Take a moment to  
6 read that, if you would.

7 A. Okay.

8 Q. The second-to-the-last  
9 sentence in Section 4.9 says, "No Trustee  
10 shall act as an attorney for any person  
11 who holds an asbestos claim."

12 Do you see that?

13 A. Yes.

14 Q. What's the reason for that?

15 A. To avoid conflicts.

16 Q. What type of conflicts?

17 A. Well, you are a trustee of a  
18 Plan paying somebody; you shouldn't be  
19 paying your client.

20 Q. Is there any other reason?

21 A. Not that I know of.

22 MR. BROWN: Mark this as

23 Austern-4.

24 (Austern-4 marked for

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1 was a judge of, I believe, the Circuit  
2 Court in Cook County, Illinois for a  
3 period of time, and he is an asbestos  
4 trustee of -- it seems to me, he is the  
5 sole trustee of the Loomis Trust and also  
6 a Futures Rep, I believe, at Armstrong.

7 Q. Okay. And he was one of the  
8 gentlemen that you mentioned that, if I  
9 remember correctly, the Asbestos PI  
10 Committee, otherwise known as the ACC,  
11 wanted to have the role that you have?

12 A. Yes.

13 Q. Do you know how long he has  
14 been a trustee of the Loomis Trust?

15 A. Since it was confirmed. And  
16 this I really should know, but I think it  
17 was confirmed about three years ago.

18 Q. Okay. And do you know  
19 whether he was the FCR in Armstrong  
20 before a plan was confirmed?

1 A. I do not know.

2 Q. Okay. But he is the FCR for  
3 the Trust?

4 A. Yes, I believe he is.

1 identification at this time.)

2 BY MR. BROWN:

3 Q. Exhibit-4, Mr. Austern, is  
4 Exhibit 6 to the Exhibit Book. My first  
5 question for you is, can you identify it?

6 A. It's the Asbestos Insurance  
7 Transfer Agreement, which is part of the  
8 Plan, as you point out.

9 Q. And I believe you said this  
10 is one of the documents that you had  
11 reviewed; am I correct?

12 A. Yes.

13 Q. Do you understand this  
14 agreement?

15 A. Not in its entirety.

16 Q. Okay. Are there particular  
17 provisions of this agreement that you do  
18 not understand that you could direct my  
19 attention to?

20 A. Well, I would have to look  
21 at it for a moment. I am not sure I  
22 understand all of the representations and  
23 warranties and some of the terms in them.  
24 There are two schedules, if I remember

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1 correctly, here.

2 **Q. I think there is three.**

3 A. All right. I was never  
4 quite sure I understood the constant or  
5 individual differences between the  
6 Schedules 2 and 3.

7 **Q. Okay. Other than what you**  
8 **what you just described, do you generally**  
9 **have a good handle on the Asbestos**  
10 **Insurance Transfer Agreement?**

11 A. I wouldn't describe it as a  
12 good handle, but I recognize some of the  
13 paragraphs.

14 **Q. All right. Let me direct**  
15 **your attention -- let's look at Section 1**  
16 **on page 2, and you should probably look**  
17 **at subsection (a). And then (d) is the**  
18 **one I have the question on.**

19 A. Yes.

20 **Q. In (d), it says, "The**  
21 **Transfer is not an assignment of any**  
22 **insurance policy."**

23 **Do you see that?**

24 A. Yes.

1 A. In general.

2 **Q. Could you describe for me**  
3 **what some of those duties are?**

4 A. Well, you have to report  
5 claims.

6 **Q. Okay.**

7 A. And you have to, under  
8 certain policies, confer with the  
9 insurance company about what you are  
10 settling and why and for how much. And,  
11 forgetting individual policies for a  
12 minute, under corporate policies, there  
13 are certain audit rights that sometimes  
14 exist as a condition of payment to the  
15 insured.

16 **Q. Are you familiar with the**  
17 **requirement in some policies that the**  
18 **insurer have a right to defend the**  
19 **insured?**

20 MR. LIESEMER: Object to  
21 form.

22 THE WITNESS: As well as an  
23 obligation.

24 BY MR. BROWN:

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1 **Q. What is it?**

2 A. It's an assignment of a --  
3 do you mean what is the Transfer  
4 Agreement?

5 **Q. Yes. What is the transfer,**  
6 **which is a defined term?**

7 A. Being transferred?

8 **Q. Yes.**

9 A. The proceeds.

10 **Q. Anything else?**

11 A. Well, I confess as the  
12 Futures Claims Rep, I never got past the  
13 proceeds because the money was what  
14 interested me.

15 **Q. Okay. Have you reviewed any**  
16 **of the Debtors' insurance policies?**

17 A. No.

18 **Q. Have you ever reviewed a**  
19 **general liability insurance policy?**

20 A. Yes.

21 **Q. Do you have a general**  
22 **understanding as to the duties and**  
23 **obligations of an insured under general**  
24 **liability insurance policy?**

1 **Q. Okay. And are you aware**  
2 **that in some policies there is a right on**  
3 **the part of the insurer to associate in**  
4 **the defense of the insured?**

5 MR. LIESEMER: Object to  
6 form.

7 THE WITNESS: I am not sure  
8 I am familiar with that.

9 BY MR. BROWN:

10 **Q. Okay. Well, you indicated**  
11 **that the one thing you knew that was**  
12 **being transferred was proceeds.**

13 **Are you aware of anything**  
14 **else that's being transferred pursuant to**  
15 **the Asbestos Insurance Transfer**  
16 **Agreement?**

17 A. I am not sure what you mean  
18 by anything else, other than the money.

19 **Q. That's it?**

20 A. Well, other things may be  
21 being transferred, but I can't think of  
22 anything right now.

23 **Q. Okay. Do you have an**  
24 **understanding as to whether the Asbestos**

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1 **PI Trust will become the insured under**  
2 **the policies that are listed on Schedule**  
3 **1 to this agreement?**

4 MR. GUY: Objection, calls  
5 for a legal conclusion.

6 THE WITNESS: Mr. Brown, I  
7 don't know. I certainly hope so.

8 BY MR. BROWN:

9 **Q. Do you have an understanding**  
10 **as to what, if anything, happens to the**  
11 **obligations of the insured under the**  
12 **policies on Schedule 1 if the Plan is**  
13 **confirmed?**

14 MR. GUY: Objection to form.

15 MR. LIESEMER: I join in  
16 that objection.

17 THE WITNESS: Let me make  
18 sure I understand the question.

19 What happens to the obligations of  
20 -- if the policy was still in the  
21 hands of the Debtor, what would  
22 happen to the obligations of the  
23 Debtor and the rights of the  
1 insurance company?

1 that's responsive to your  
2 question.

3 BY MR. BROWN:

4 **Q. What is it going to do?**

5 **What is the Trust going to do?**

6 MS. BAER: Objection to  
7 form.

8 MR. LIESEMER: I join.

9 THE WITNESS: It's going to  
10 settle claims pursuant to the  
11 Trust Distribution Process.

12 BY MR. BROWN:

13 **Q. Okay. Will the Debtors'**  
14 **insurers have any role in the handling**  
15 **defense or settlement of any claim**  
16 **submitted to the Asbestos PI Trust?**

17 MR. GUY: Objection.

18 MR. LIESEMER: Objection to  
19 form.

20 MR. GUY: Objection, calls  
21 for speculation.

22 MS. BAER: Objection, same.

23 THE WITNESS: Let me address  
24 audit rights. In my copious free

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1 BY MR. BROWN:

2 **Q. I am not sure I understood**  
3 **the qualification. Let me try it a**  
4 **little differently.**

5 **To the extent that the**  
6 **Debtor has duties and obligations under**  
7 **one or more of its insurance policies, if**  
8 **this Plan is confirmed, what happens to**  
9 **those duties and obligations, as you**  
10 **understand it?**

11 MR. LIESEMER: Object to the  
12 form.

13 MS. BAER: I join in the  
14 objection.

15 THE WITNESS: The Plan is  
16 going to be administered pursuant  
17 to the Trust Distribution Process  
18 as it affects personal injury  
19 asbestos claims.

20 To that extent, the personal  
21 injury Trust, as far as I know, is  
22 not going to call up each and  
23 every insurance company and say  
24 "Can I settle this claim?" I hope

1 time, Mr. Brown, I am the claims  
2 administrator of the Dow Corning  
3 Trust -- that is not an asbestos  
4 Trust -- and this issue has arisen  
5 in that context. And I dare say  
6 it may arise in the context of the  
7 W.R. Grace Trust.

8 If insurance companies  
9 object to paying because they do  
10 not have audit rights or because  
11 of any other input into the Trust,  
12 I dare say they are going to bring  
13 that to the attention of the  
14 trustees. And either that will be  
15 worked out between the trustees  
16 and the insurance company or  
17 some -- I don't like this phrase  
18 because I am not sure I know what  
19 it means -- but some coverage  
20 court will have to determine the  
21 rights of the insurance company as  
22 a function of the trustees'  
23 duties.

24 MR. BROWN: Could you read

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1 back the question?  
2 (The reporter read from the  
3 record as requested.)  
4 BY MR. BROWN:  
5 **Q. Other than what you just**  
6 **described, will the Debtors' insurers**  
7 **have any role in the handling defense or**  
8 **settlement of asbestos PI claims into the**  
9 **Trust?**  
10 MR. GUY: Same objection as  
11 to speculation.  
12 MR. LIESEMER: Same  
13 objection.  
14 MS. BAER: Same.  
15 THE WITNESS: I don't know  
16 what the trustees are going to do  
17 about that, so I don't know.  
18 MR. BROWN: Why don't we  
19 take five minutes.  
20 (There was a break from  
21 11:46 a.m. to 11:57 a.m.)  
22 MR. BROWN: Let's go ahead  
23 and mark this document.  
24 (Austern-5 marked for

1 A. No.  
2 **Q. Is there a reason for that?**  
3 A. I don't know.  
4 MR. BROWN: All right.  
5 Let's mark this.  
6 (Austern-6 marked for  
7 identification at this time.)  
8 BY MR. BROWN:  
9 **Q. Mr. Austern, you have**  
10 **another document in front of you now**  
11 **marked Austern-6. It's Exhibit 10 to the**  
12 **Exhibit Book.**  
13 **Can you identify this**  
14 **development?**  
15 A. It is the Cooperation  
16 Agreement between the Debtor and others.  
17 **Q. And, again, this is one of**  
18 **the documents that you reviewed in**  
19 **preparation for today's deposition,**  
20 **correct?**  
21 A. I don't remember if I  
22 specifically did it for that purpose, but  
23 I have certainly reviewed it in the past.  
24 **Q. Okay. What is the purpose**

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1 identification at this time.)  
2 BY MR. BROWN:  
3 **Q. Mr. Austern, you have been**  
4 **handed what's been marked Austern-5.**  
5 **It's Exhibit 4 to the Exhibit Book.**  
6 **Can you identify it?**  
7 A. This is the TDP for the  
8 Plan.  
9 **Q. I am correct, am I not, that**  
10 **this is one of the documents that you**  
11 **reviewed in preparation for today's**  
12 **deposition?**  
13 A. Yes.  
14 **Q. Are you aware of any**  
15 **provision in the TDP or the Trust**  
16 **Agreement that we spoke about earlier**  
17 **that provides for any role for the**  
18 **Debtors' insurers in the handling,**  
19 **defense, or settlement of any asbestos**  
20 **claims submitted to the Trust?**  
21 A. No.  
22 **Q. Are you aware of any other**  
23 **Plan document that provides for such a**  
24 **role?**

1 **of this document?**  
2 A. I am not sure I know the  
3 legal purpose. It creates certain rights  
4 and obligations between and among some of  
5 the parties.  
6 **Q. Okay. And who are those**  
7 **parties?**  
8 A. Well, the Debtor, the  
9 Reorganized Debtor, and the Trust. I  
10 mean the personal injury Trust.  
11 **Q. The Debtors' insurers are**  
12 **not a party to this agreement, correct?**  
13 A. No.  
14 **Q. We talked a little bit**  
15 **earlier about general liability insurance**  
16 **policies.**  
17 **Are you generally familiar**  
18 **with what's called duty to cooperate in a**  
19 **general liability policy on the part of**  
20 **the insured?**  
21 A. Generally.  
22 MR. LIESEMER: Objection to  
23 form.  
24 BY MR. BROWN:

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1 **Q. If the Joint Plan is**  
2 **confirmed and if there is a duty to**  
3 **cooperate under a given policy, what**  
4 **happens to that duty?**

5 MR. GUY: Objection, calls  
6 for speculation.

7 THE WITNESS: Well, the  
8 proceeds of the policy have been  
9 transferred to the Personal Injury  
10 Trust. I don't know what happens  
11 to the duty of the Trust standing  
12 in the shoes of the Debtor.

13 BY MR. BROWN:

14 **Q. So you don't know whether**  
15 **the Trust steps into the shoes of the**  
16 **Debtor with respect to the Debtors'**  
17 **obligations under the policy; is that**  
18 **what your telling me?**

19 A. I don't know.

20 MR. BROWN: I think I am  
21 going to pass you to the next  
22 questioner, Mr. Austern. Thank  
23 you. Subject to maybe a few  
1 follow-ups, I am finished.

1 **Exhibit-4, which is the Transfer**  
2 **Agreement, and look at Schedules 2 and 3?**

3 A. (Witness complies with  
4 request.)

5 **Q. Correct me if I'm wrong, I**  
6 **believe you said you weren't sure what**  
7 **the difference was between Schedules 2**  
8 **and 3?**

9 A. In the sense that I don't  
10 know why there are two schedules. I  
11 mean, clearly different people are listed  
12 under certain schedules.

13 **Q. Do you have an understanding**  
14 **that the types of settlement agreements**  
15 **are different on Schedule 2 and Schedule**  
16 **3?**

17 A. I assume that's why there  
18 are two schedules.

19 **Q. You previously also**  
20 **mentioned that you understood that there**  
21 **were three types of insurance agreements;**  
22 **there were settlements -- there were**  
23 **settled insurers, there were unsettled**  
24 **insurers, and there were insurers are**

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1 - - -  
2 EXAMINATION  
3 - - -

4 BY MS. ALCABES:

5 **Q. Hello, Mr. Austern. My name**  
6 **is Elisa Alcabes from Simpson Thacher &**  
7 **Bartlett. I am counsel for Travelers**  
8 **Casualty and Surety Company.**

9 **Travelers served a Notice of**  
10 **Deposition on you. I am just going to**  
11 **have that marked.**

12 (Austern-7 marked for  
13 identification at this time.)

14 BY MS. ALCABES:

15 **Q. Do you recall seeing this**  
16 **notice?**

17 A. I saw many notices. I don't  
18 know if I saw this one.

19 **Q. Okay. And are you familiar**  
20 **at all with any of the agreements between**  
21 **Travelers and W.R. Grace that were**  
22 **entered into pre-petition?**

23 A. No.

24 **Q. Can you turn to Austern**

1 **coverage in place agreements or**  
2 **reimbursement agreements? I am not sure**  
3 **I said that exactly right.**

4 **I believe you said you**  
5 **understood there were three types of**  
6 **settled insurers -- three types of**  
7 **insurers. I have got it right now.**  
8 **Three types of insurers.**

9 **There are unsettled**  
10 **insurers, fully settled insurers, and**  
11 **insurers with coverage in place or**  
12 **reimbursement agreements; is that right?**

13 A. That is my understanding.

14 **Q. And that's how you**  
15 **understand this Plan to operate; is that**  
16 **correct?**

17 A. Yes.

18 **Q. Okay. So do you understand**  
19 **that Schedule 2 lists the fully settled**  
20 **insurers, the insurers that have fully**  
21 **settled agreements?**

22 A. What do you mean by fully?

23 **Q. Fully paid settlement**  
24 **agreements.**

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MS. ALCABES: Can you give me two minutes? I may be finished.

(There was a break from 12:24 p.m. to 12:25 p.m.)

BY MS. ALCABES:

**Q. I just have one more question, and it relates to the Disclosure Statement, which I don't know if I have a copy to mark as an exhibit. But I just want to read you one passage from Section 7.2.2(d)(iv).**

MR. GUY: I have one if you want to mark it.

MS. ALCABES: Thank you.

Let's mark this as Austern-8.

(Austern-8 marked for identification at this time.)

BY MS. ALCABES:

**Q. In my copy, it appears on page 105. Actually, I quoted it wrong. It's 4.7.2.2, Funding of the Asbestos PI Trust.**

A. 4.7.2?

**you know what that is referring to.**

A. I hesitate because I spent some time studying 7.2.2(d)(iv) or whatever this is, which is not here. It might help me if I could look at that.

**Q. 7.25.2(d)(iv)?**

A. Yes.

**Q. It's in the Plan, which is the section we were just looking at before on page --**

A. Wait a minute. I have not found the Plan. Yes. I am sorry.

**Q. It's on page 63 of the Plan.**

A. Okay. I am sorry. What was the question?

**Q. What does the reference to the literal terms of certain reimbursement conditions in the Disclosure Statement passage that I read to you mean?**

A. Well, to the extent I understand this -- and I am not positive this is responsive to your question -- pursuant to some of the reimbursement

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**Q. 4.7.2.2, and I am going to direct you to the paragraph just before 4.7.2.3, the paragraph that starts, "Section 7.2.2(d)(iv) of the Plan..."**

**Do you see that? Have you found it?**

A. No.

MR. GUY: It's on the bottom of --

THE WITNESS: Okay. I am sorry.

BY MS. ALCABES:

**Q. If you go towards the latter part of the paragraph, there is a sentence that starts, "As a result, the Plan Proponents believe that, without Section 7.2.2(d)(iv), the Asbestos PI Trust may not be able to fulfill the literal terms of certain reimbursement conditions in the Asbestos Insurance Reimbursement Agreements..."**

**And I would just ask you to refer to the literal terms of certain reimbursement conditions and ask you if**

agreements, an insurance company would be required to pay Grace money if Grace had paid a claim following judgment of the tort system or by way of settlement.

And what this is, I believe, saying is that that the insurer now has to pay Personal Injury Trust when the Personal Injury Trust pays a claim.

**Q. But, again, it doesn't speak to any other obligations that may exist under the reimbursement agreement on the part of Grace before it can demand payment from an insurer?**

MR. LIESEMER: Objection to form.

MS. BAER: Objection.

THE WITNESS: The document does not, that's correct.

BY MS. ALCABES:

**Q. So, for example, it does not address whether or not the Trust will have to allocate payments or provide reporting to the insurers or allow audits to be taking place, correct?**



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1 MR. LIESEMER: Objection to  
2 form.

3 MS. BAER: Same.

4 THE WITNESS: The document  
5 does not say that.

6 BY MS. ALCABES:

7 **Q. And the Plan does not say**  
8 **that?**

9 A. And the Plan does not say  
10 that.

11 **Q. And does the fact that the**  
12 **Plan doesn't address the obligations --**  
13 **strike that.**

14 **Does the fact that the Plan**  
15 **doesn't address how the Trust will**  
16 **perform obligations under a reimbursement**  
17 **agreement impact your view as to whether**  
18 **the Plan is fair as to the future**  
19 **claimants?**

20 MR. GUY: Objection, lacks  
21 foundation.

22 THE WITNESS: It does not  
23 impact it.

24 BY MS. ALCABES:

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1 **need to speak up a little bit so everyone**  
2 **can hear me.**

3 MR. CANDON: I would like to  
4 mark this as Exhibit-9.

5 (Austern-9 marked for  
6 identification at this time.)

7 BY MR. CANDON:

8 **Q. It's the Notice of**  
9 **Deposition. Do you recall having**  
10 **received or have seen that?**

11 A. Yes.

12 **Q. I will start with another**  
13 **exhibit here.**

14 MR. CANDON: Austern-10.

15 (Austern-10 marked for  
16 identification at this time.)

17 BY MR. CANDON:

18 **Q. Can you tell me what that**  
19 **is?**

20 MR. GUY: Do you have  
21 another copy?

22 MR. CANDON: No, I don't.  
23 This was an exhibit in  
24 Mr. Lockwood's deposition.

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1 **Q. Why not?**

2 A. Because I believe the  
3 insurance money is going to come to the  
4 Trust, and I am only interested in the  
5 money.

6 MS. ALCABES: I will pass  
7 the witness. Thank you.

8 - - -  
9 (There was a luncheon recess  
10 from 12:31 p.m. to 1:05 p.m.)

11 - - -  
12 AFTERNOON SESSION

13 - - -  
14 EXAMINATION

15 - - -

16 BY MR. CANDON:

17 **Q. Good afternoon, Mr. Austern.**  
18 **My name is Chris Candon. I am from the**  
19 **law firm Cohn Whitesell & Goldberg,**  
20 **representing the Libby claimants. By**  
21 **Libby claimants, it is terminology that**  
22 **clients of our firm that are based in**  
23 **Libby and expressed to asbestos exposure**  
24 **in Lincoln County, Montana. I probably**

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1 BY MR. CANDON:

2 **Q. If you focus on pages 8, 9,**  
3 **10.**

4 MS. BAER: What is it?

5 MR. CANDON: It's the 8-K  
6 and the Term Sheet.

7 MS. BAER: And that's  
8 Exhibit-10?

9 MR. CANDON: Yes.

10 BY MR. CANDON:

11 **Q. Do you recall having**  
12 **participated in negotiations of this Term**  
13 **Sheet?**

14 A. I participated in  
15 negotiations of the Term Sheet. It was  
16 in a somewhat different form than an 8-K,  
17 but yes.

18 **Q. Other than the terms that**  
19 **are embodied on the Term Sheet, were you**  
20 **aware of any other agreements made with**  
21 **respect to Plan proponents and going**  
22 **forward?**

23 MR. GUY: Objection, vague.

24 MS. BAER: Objection to

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1 form.

2 MR. GUY: Do you mean at the  
3 time of the Term Sheet?

4 BY MR. CANDON:

5 Q. At the time of the Term  
6 Sheet, any separate agreements that the  
7 terms are not embodied in that Term  
8 Sheet?

9 A. Do you mean between the  
10 personal injury Trust and the Debtor?

11 Q. Just any of the participants  
12 or members of the agreement.

13 A. I don't recall any.

14 Q. Okay. Are you aware of any  
15 oral agreements?

16 A. No.

17 Q. Okay. What agreements, if  
18 any, were struck with respect to how  
19 Libby claimants would be treated?

20 MS. BAER: Objection to  
21 form.

22 THE WITNESS: In the Term  
23 Sheet?

24 BY MR. CANDON:

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1 of the provisions are contained in  
2 other Trust Distributions.

3 BY MR. CANDON:

4 Q. Okay. The TDP refers to  
5 values within the tort system in multiple  
6 places. Section 2.1, the second sentence  
7 is rather long, but we can read it here.  
8 It says, "This TDP furthers that goal by  
9 setting forth procedures for processing  
10 and paying Grace's several share of the  
11 unpaid portion of the value of the  
12 asbestos personal injury claims generally  
13 on an impartial, first-in-first-out  
14 basis, with the intention of paying all  
15 claimants over time as equivalent a share  
16 as possible of the value of their claims  
17 based on historical values for  
18 substantially similar claims in the tort  
19 system."

20 And in Section 5.3(b)(2), it  
21 says in the second sentence that "The PI  
22 Trust shall thus take into consideration  
23 all of the factors that affect the  
24 severity of damages and values within the

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1 Q. Yes. You have already  
2 testified that there were no other  
3 agreements and no oral agreements, so I  
4 am assuming there were no other  
5 agreements. But I am asking you, are you  
6 aware of any other agreements during the  
7 negotiations of this Term Sheet?

8 A. Of the Term Sheet, no.

9 Q. Now I would like to turn to  
10 Exhibit-5, which is the TDP.

11 Do you have that?

12 A. Yes.

13 Q. Who drafted the TDP?

14 A. Well, that's a hard question  
15 to answer because many, many, many of the  
16 provisions, but not all, of this Trust  
17 Distribution Process are incorporated  
18 from other Trust Distribution Processes.

19 Q. And so it was based on a  
20 model from another case or from several  
21 other cases?

22 MS. BAER: Objection, form.

23 THE WITNESS: I am not sure  
24 I would call it a model, but many

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1 tort system including..." and then it  
2 goes on to list a number of factors.

3 Is the TDP designed to pick  
4 claimants values substantially similar to  
5 the claim values that the claimants would  
6 receive in the tort system?

7 A. It is designed to create  
8 scheduled values, but not necessarily  
9 pay, that are similar to values in the  
10 tort system.

11 Q. Do you know why that's done?

12 A. Why what's done?

13 Q. Why they are scheduled  
14 values similar to what's done in the tort  
15 system?

16 MS. BAER: Objection, form;  
17 objection, speculation.

18 THE WITNESS: Well, the why  
19 is simply the way it's done. I am  
20 not sure I can tell you as an  
21 underlying philosophical reason.

22 BY MR. CANDON:

23 Q. Okay. Are you familiar with  
24 Supreme Court case Butner versus the

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1 Q. Why did you do that?

2 A. Because it had been a long  
3 time since I had looked at them.

4 Q. Does the FCR have an opinion  
5 on what the total value of the claims  
6 that will be processed through the  
7 anticipated Trust will be?

8 A. I have relied on Ms. Biggs.

9 Q. And what he is her current  
10 view?

11 A. Discounted back to the  
12 petition date, the viability is between  
13 \$3.2 and \$5 billion with her best  
14 estimate, I think that's what it's  
15 called, at 3.6.

16 Q. And do you remember how much  
17 nominal dollars that would involve  
18 running through the Trust over time?

19 A. Well, no, I don't.

20 Q. It would be in her report.  
21 Why do you think her number  
22 is the most reliable?

23 MR. GUY: Objection. He  
24 didn't state that.

1 A. People who have an asbestos  
2 personal injury claim against W.R. Grace.

3 Q. Irrespective of whether or  
4 not that claim would be compensable under  
5 nonbankruptcy law?

6 MR. GUY: Objection.

7 MS. BAER: Objection to  
8 form.

9 MR. GUY: It  
10 mischaracterizes his testimony.

11 THE WITNESS: Well, if it  
12 can't settle or it goes into the  
13 tort system, those are the two  
14 ways in nonbankruptcy law that I  
15 assume it could be compensated.

16 BY MR. COHN:

17 Q. Well, you were appointed,  
18 what, in 2004 --

19 A. 2004.

20 Q. -- as the FCR.

21 And in 2004, there were no  
22 TDPs, right?

23 MR. GUY: Objection.

24 THE WITNESS: You mean in

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1 THE WITNESS: Well, first of  
2 all, she is my expert. Second,  
3 Dr. Florence has represented  
4 Grace. I believe he said since  
5 1995 or something -- I am sorry.  
6 He doesn't represent them. He has  
7 been Grace's future claims  
8 forecaster since 1995. And  
9 Dr. Peterson has done future  
10 claims forecasting for the  
11 plaintiffs bar for a long time.  
12 They accidentally, or because of  
13 that, represent the high and the  
14 low figure, and Ms. Biggs  
15 represents the in-between figure.

16 BY MR. COHN:

17 Q. Now, you said that you are  
18 the representative of future claimants  
19 and your constituency is future  
20 claimants, right?

21 A. Yes.

22 Q. How do you distinguish what  
23 sort of people are entitled to be future  
24 claimants?

1 this case?

2 BY MR. COHN:

3 Q. Right. There was no Plan;  
4 there were no TDPs, correct?

5 A. That's right.

6 Q. Are you aware that there  
7 are -- do you believe that there at the  
8 time of petition were claimants against  
9 W.R. Grace who had no symptoms of any  
10 asbestos-related disease?

11 A. I don't know.

12 Q. Do you consider people that  
13 in the future have no symptoms of  
14 asbestos-related disease but bring a  
15 claim against W.R. Grace to be part of  
16 your constituency?

17 MR. LIESEMER: Objection to  
18 form, speculation.

19 MR. GUY: Same objection.

20 MS. BAER: Same.

21 THE WITNESS: Well, at the  
22 risk of this being too  
23 existential, of course, as soon as  
24 they bring the claim, they are not

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1 my client.

2 I have never thought about  
3 whether if you have been exposed  
4 to W.R. Grace asbestos -- well,  
5 let me back up a step.

6 You can be exposed to W.R.  
7 Grace asbestos and never assert a  
8 claim because you have no  
9 manifestation of an  
10 asbestos-related disease. I don't  
11 know if those people are my  
12 punitive clients or not.

13 BY MR. COHN:

14 **Q. Well, your job, as the FCR,**  
15 **one of your jobs is to maximize the pool**  
16 **of assets available for future claimants**  
17 **to recover from eventually, correct?**

18 A. In many different ways, yes.

19 **Q. Is it also your job to**  
20 **protect those future claimants from**  
21 **having that pool of assets minimized by**  
22 **claimants who are not really sick?**

23 A. That would include present  
24 claimants, too, yes.

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1 TDP that says everyone who can should be  
2 fit under the umbrella of this Trust  
3 Distrubution Process.

4 **Q. What did you do -- strike**  
5 **that.**

6 **Did you have any involvement**  
7 **in the negotiation of the TDPs?**

8 MR. GUY: You may answer yes  
9 or no.

10 THE WITNESS: Yes.

11 BY MR. COHN:

12 **Q. What was your involvement?**

13 A. I attended meetings; I  
14 consulted with counsel; I consulted with  
15 other parties.

16 **Q. What issues were you**  
17 **particularly interested in?**

18 MS. BAER: Objection.

19 THE WITNESS: The Trust  
20 Distrubution Process.

21 BY MR. COHN:

22 **Q. Were there any areas where**  
23 **you had disagreement with the ACC?**

24 MS. BAER: Objection. Now

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1 **Q. When the Trust is formed,**  
2 **claimants will be beneficiaries of that**  
3 **Trust, right?**

4 A. Yes.

5 **Q. Do you view it as part of**  
6 **your job to advocate standards that**  
7 **ensure only true beneficiaries are**  
8 **compensated?**

9 MR. LIESEMER: Objection to  
10 form.

11 MR. GUY: Objection.

12 THE WITNESS: If we could  
13 agree on what a true beneficiary  
14 was, yes.

15 BY MR. COHN:

16 **Q. What, to you, is a true**  
17 **beneficiary?**

18 A. I think somebody who has not  
19 been exposed to Grace asbestos is not a  
20 beneficiary. I think somebody who has  
21 been exposed to a Grace asbestos and has  
22 no manifestation of an asbestos-related  
23 disease or defect is not a beneficiary  
24 subject to the prefatory language in the

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1 you are going way beyond what we  
2 agreed to --

3 MR. LIESEMER: I join the  
4 objection.

5 MS. BAER: -- with Plan  
6 proponents. I don't believe it's  
7 appropriate inquiry for this  
8 deposition.

9 MR. GUY: Can you repeat the  
10 question?

11 (The reporter read from the  
12 record as requested.)

13 MR. GUY: I am going to  
14 instruct the witness not to answer  
15 that because I don't see how he  
16 can answer it without revealing  
17 discussions with the parties that  
18 are objecting to the revealing of  
19 those discussions.

20 MR. COHN: So are we back to  
21 where we have been in the Finke  
22 deposition?

23 MR. GUY: I don't know. I  
24 didn't go to the Finke deposition.

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MR. COHN: And the Lockwood deposition, that as soon as I start getting into substantive issues about what happened in the negotiation of the Plan of the TDPs, I am going to face an instruction not to answer on the bases that Ms. Harding has set forth previously?

MR. GUY: I didn't attend Finke. I did attend Peter's. I know that objection was raised, but I also know that he got into a lot of those issues. So we will take it question by question.

MS. BAER: The Debtor will object to any of those questions being asked and answered.

MR. LIESEMER: So will the ACC.

BY MR. COHN:

**Q. Who besides the FCR and the ACC was involved in the negotiation of the TDPs, if anyone?**

interest called sequencing; inflation issues; and the scheduled values.

**Q. You want to maximize the recovery for your constituency, correct?**

A. Yes.

**Q. You want to maximize the likelihood that money is going to be available to pay your constituency, correct?**

A. That's correct.

**Q. You want to at the same time maximize the payment to all beneficiaries within the confines of making sure there is enough money around; is that right?**

MR. GUY: Objection as to beneficiaries.

THE WITNESS: Well --

MR. COHN: Let me take that back.

BY MR. COHN:

**Q. Do you understand beneficiaries to be those people who are entitled to receive money from the Trust?**

A. Yes.

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A. I don't remember anybody else.

**Q. So, as far as you know, the TDPs were drafted in consultation between the FCR and the ACC alone; is that correct?**

MR. GUY: Objection.

THE WITNESS: Well, recognizing that the ACC included a Libby claimant, the answer is yes.

BY MR. COHN:

**Q. Okay. Is it fair to say that -- strike that.**

**In constructing TDPs, what are the major concerns of you, as the FCR?**

A. The payment percentage; the maximum available payment; the maximum payment meaning the year; whether there is sequencing, which in plain English is if you are not paid -- if you are awarded a payment but not paid because of maximum available payment percentages, you get

MR. GUY: Presents or futures?

MR. COHN: Aren't the futures and the presents all beneficiaries of the contemplated Trust?

MR. GUY: But your questions have been asking about futures, and the witness has been answering as to futures. And now you are bringing it back as to --

MR. COHN: I thought I was talking holistically.

BY MR. COHN:

**Q. Does your answer change for the last couple of questions?**

A. No. But I was going to say the Plan -- the TDP and I believe the Plan itself requires that all beneficiaries be treated similarly. So to the extent that I have to live with that, the answer is yes.

**Q. What is the FCR's view with respect to the propriety of inflation,**

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1 increased payments to take account in  
2 inflation?

3 A. I am in favor of that.

4 Q. What about interest on  
5 sequencing?

6 A. I am agnostic.

7 Q. Now, you say the  
8 contemplated PI TAC is going to be  
9 Messrs. Budd, Cooney, Weitz, and Rice; is  
10 that right?

11 A. Yes.

12 Q. Now, you understand that  
13 each of them represents claimants who  
14 will seek to recover from the Trust,  
15 correct?

16 MR. GUY: Objection. This  
17 actually will be the third  
18 go-around on this issue, so I am  
19 going to be indulgent but only in  
20 a limited fashion.

21 THE WITNESS: I don't know  
22 who their future clients will be,  
23 but you are probably right.

4 BY MR. COHN:

1 foundation.

2 THE WITNESS: I don't know.

3 MR. GUY: This is

4 speculation.

5 BY MR. COHN:

6 Q. And the reason you exist in  
7 this case is because, among other things,  
8 you can't give notice to somebody that  
9 doesn't know that he is going to get sick  
10 some day?

11 A. That's among the reasons,  
12 yes.

13 Q. And you are not aware of any  
14 property owner in the United States that  
15 isn't capable of being given notice of  
16 the pendency of this bankruptcy case and  
17 their ability to assert a claim, are you?

18 A. I can tell you in the  
19 Manville case, the corporation in 1987  
20 spent something like \$10 million giving  
21 notice to people and there were people  
22 who later claimed they hadn't gotten  
23 notice. So I don't know if that's so.

24 Q. So you are happy that you

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1 Q. And you do understand that  
2 they expect to take a contingency fee  
3 payment from every dollar that they are  
4 as successful at obtaining from the Trust  
5 for their claimants?

6 MR. LIESEMER: Objection,  
7 lack of foundation.

8 MS. BAER: Objection.

9 MR. GUY: Objection.

10 THE WITNESS: It is  
11 traditional. I must tell you that  
12 I know personal injury asbestos  
13 lawyers who have waived fees.

14 BY MR. COHN:

15 Q. But that's not your  
16 expectation with respect to these  
17 gentlemen, is it?

18 A. I don't know.

19 Q. Earlier Mr. Brown asked you  
20 about the PD FCR. Do you believe that it  
21 is possible within this Plan to cut off  
22 all property damage claims without the  
23 need for a Trust?

24 MR. GUY: Objection, lacks

1 have exculpation in the Plan; is that  
2 right?

3 MR. GUY: Objection.

4 THE WITNESS: I am.

5 BY MR. COHN:

6 Q. Do you view obtaining that  
7 protection as in any way presenting a  
8 conflict between your personal interest  
9 and your duties as the FCR?

10 A. What personal interest? I  
11 don't know what personal interest you  
12 mean.

13 Q. You have a personal interest  
14 in not being sued by somebody after the  
15 Plan is confirmed.

16 A. Well, I think that's taken  
17 care of in the Trust Agreement, but  
18 putting aside where my exculpation comes  
19 from, yes. I don't think it creates any  
20 conflict.

21 MR. COHN: Two minutes.

22 (There was a break from 2:13

23 p.m. to 2:20 p.m.)

24 BY MR. COHN:

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1 **Q. How many meetings did you**  
2 **personally attend in the course of**  
3 **negotiating the TDPs?**

4 MR. GUY: Meetings with who?

5 MS. BAER: Objection.

6 BY MR. COHN:

7 **Q. I guess with the ACC would**  
8 **be the other involved party that wasn't**  
9 **your counsel.**

10 A. I am sorry. Are you  
11 eliminating this to negotiating the TDP?

12 **Q. Yes.**

13 A. I would have to guess.  
14 Somewhere between eight and 12.

15 **Q. Was there discussion of**  
16 **whether or not to permit the insurers to**  
17 **be involved in the processing of claims?**

18 MR. LIESEMER: Objection.

19 MR. GUY: Objection.

20 You can answer -- well, you  
21 know what? I will defer to these  
22 guys.

23 MS. BAER: Can you read back  
24 the question?

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1 as counsel for the FCR,  
2 Mr. Austern not to answer the  
3 question because the other Plan  
4 proponents are raising  
5 confidentiality issues with regard  
6 to settlement discussions, and I  
7 am adhering to that request.

8 And as the Court has stated  
9 many times, negotiations are not  
10 relevant and, therefore, would not  
11 be admissible at the Plan  
12 confirmation hearing.

13 MR. COHN: We disagree.

14 MR. GUY: Understood.

15 MR. COHN: I think I tested  
16 your tolerance to where I am going  
17 to get instructions not to answer.  
18 I think I will stand down now and  
19 let Mr. Plevin question.

20 - - -

21 EXAMINATION

22 - - -

23 BY MR. PLEVIN:

24 **Q. Good afternoon, Mr. Austern.**

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1 (The reporter read from the  
2 record as requested.)

3 MS. BAER: Objection.

4 MR. LIESEMER: Objection.

5 MR. GUY: But do you want  
6 the witness to answer?

7 MS. BAER: To the extent the  
8 witness would have to reveal  
9 discussions about negotiations of  
10 the various Plan documents, I  
11 would object.

12 If you can answer without  
13 revealing that kind of  
14 information, then I won't object.

15 THE WITNESS: I don't think  
16 I can.

17 MR. COHN: So you are  
18 instructing?

19 MR. GUY: Yes.

20 MR. DEMMY: Can I ask a  
21 clarifying question? Who is  
22 instructing the witness not to  
23 answer?

24 MR. GUY: I am instructing,

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1 A. Good afternoon.

2 **Q. Just so we are straight, I**  
3 **represent Fireman's Fund Insurance**  
4 **Company in this case only with respect to**  
5 **issues concerning Fireman's Fund's proof**  
6 **of claim and the indemnity agreement**  
7 **between Fireman's Fund and Grace and the**  
8 **supersedeas bond that Fireman's Fund**  
9 **posted with respect to a case in Texas**  
10 **that I want to ask you some questions**  
11 **about.**

12 **Let me start, first of all,**  
13 **by asking if you are generally familiar**  
14 **with the Edwards case in Texas?**

15 A. Yes.

16 **Q. Can you tell me what you**  
17 **know about that case in general?**

18 A. Mr. Reaud, R-E-A-U-D, I  
19 think --

20 **Q. Correct spelling. I don't**  
21 **know if the pronunciation is right.**

22 A. -- has a judgment on appeal  
23 in an asbestos personal injury claim  
24 against Grace in a number of millions of

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1 dollars. I think that's what I know --  
2 which was stayed, of course, because of  
3 the bankruptcy.

4 **Q. And in which the appeal was**  
5 **stayed?**

6 A. The appeal was stayed.

7 **Q. And I will represent to you**  
8 **that there were five plaintiffs who are**  
9 **part of that judgment.**

10 But your understanding then  
11 is that there was a judgment in the trial  
12 court, correct?

13 A. Correct.

14 **Q. Which was appealed?**

15 A. Correct.

16 **Q. And that the appellate**  
17 **proceedings were stayed by the Grace**  
18 **bankruptcy?**

19 A. Correct.

20 **Q. Do you know that as part of**  
21 **the appellate proceedings, Fireman's Fund**  
22 **posted a supersedeas bond to enable Grace**  
23 **to go forward on the appeal without**  
24 **Grace's assets being immediately at risk**

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1 for execution by the plaintiffs?

2 A. I have been told that.

3 **Q. Do you understand that in**  
4 **connection with the issuance of the**  
5 **supersedeas bond, Fireman's Fund and**  
6 **Grace entered into an indemnity agreement**  
7 **pursuant to which Grace agreed to**  
8 **indemnify Fireman's Fund for any amounts**  
9 **that Fireman's Fund paid pursuant to the**  
10 **bond?**

11 A. I have been told that.

12 **Q. And do you know that**  
13 **Fireman's Fund has filed a proof of claim**  
14 **seeking to recover from Grace's estate**  
15 **any and all amounts that Fireman's Fund**  
16 **might be obligated to pay under the**  
17 **supersedeas bond?**

18 A. I have been told that.

19 **Q. Do you have a view as to the**  
20 **likelihood of success on Grace's appeal**  
21 **or the strength of Grace's position on**  
22 **appeal?**

23 MR. GUY: Objection, seeks a  
24 legal conclusion.

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1 MS. BAER: Objection. It  
2 also seeks attorney-client  
3 communication.

4 MR. LIESEMER: Same  
5 objection.

6 MR. GUY: To the extent you  
7 can answer without revealing  
8 communications with your  
9 counsel --

10 MR. PLEVIN: Let me just be  
11 certain that I did not ask him for  
12 any communications. I didn't ask  
13 him what anybody told him or what  
14 he said to anybody. I asked him  
15 if he has a view.

16 He is a party to the  
17 bankruptcy as the Future  
18 Claimants' Representative, and he  
19 either has a view or he doesn't.  
20 If he has a view, I intend to ask  
21 him what his view is and what the  
22 basis for it is.

23 And if the point then is  
24 that he can only say it based on

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1 counsel, that would be the proper  
2 time to make that objection.

3 MR. GUY: I actually don't  
4 think you can, because what you  
5 are trying to elicit is expert  
6 testimony from a lawyer about a  
7 merits of a case that's pending in  
8 court. And that testimony would  
9 be barred on a 701 F.R.E. I don't  
10 think you can ask that. It would  
11 not be admissible in the  
12 bankruptcy case.

13 If you can explain to me how  
14 Mr. Austern's view about the  
15 merits of a legal case would be  
16 admissible before Judge  
17 Fitzgerald, I would be happy to  
18 hear it. Maybe you can try it  
19 another way.

20 MR. PLEVIN: I am trying to  
21 think of what the other way would  
22 be.

23 MR. GUY: There is no good  
24 way.



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**Mr. Austern, the concept of set-off in bankruptcy?**

A. I understand set-off generally as a proposition. I am not sure I would apply it -- I don't know that I know enough bankruptcy law to apply it to bankruptcy.

**Q. Okay. What is your understanding of the concept of set-off?**

A. Well, if I owe you \$10,000 and I have to pay Mr. Guy because you owe him some money, I can set-off from what I paid Mr. Guy what I owe you.

MR. PLEVIN: Can you read that answer back?

(The reporter read from the record as requested.)

BY MR. PLEVIN:

**Q. Are you aware, Mr. Austern, that Grace has made claims for insurance coverage against Fireman's Fund under liability insurance policies issued by Fireman's Fund?**

A. Yes.

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question without getting into a legal analysis. He is here as a fact witness.

But, again, let me talk to my client, and I think we can resolve it with the answer.

MS. BAER: We join in the objection.

(There was a discussion held off the record at this time.)

THE WITNESS: I have no view.

BY MR. PLEVIN:

**Q. Do you have a concern that if the Edwards appeal were to be -- withdrawn.**

**Do you have a concern that if the Edwards judgment were to be affirmed on appeal and Fireman's Fund paid money to Edwards and then made a claim against Grace for the amount paid, that that would in some way reduce the amount of money coming into the Trust from the Fireman's Fund insurance policy?**

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**Q. And that the insurance coverage claims Grace has made at least include, if not -- they are not limited to claims for coverage of asbestos personal injury claims?**

A. I am sorry. Can you say that again?

**Q. I got a little tied up there.**

**Grace is seeking coverage from Fireman's Fund under the Fireman's Fund insurance coverage policies for asbestos personal injury claims asserted against Grace, correct?**

A. Yes.

**Q. Do you have a view as to whether in the event that Fireman's Fund is obligated to pay insurance coverage to Grace, Fireman's Fund would be able to reduce that obligation by any amount that Grace is obligated to pay under the indemnity agreement?**

MR. GUY: Objection. I don't see how he can answer that

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MR. LIESEMER: Objection to the form.

MS. BAER: Objection.

MR. GUY: Objection to form.

THE WITNESS: Mr. Plevin, I have any concern that the activity might reduce the amount of insurance coming into the Grace Trust. And I understand this is approximately \$6 million. And if Fireman's Fund were to reduce its payment or be entitled to reduce its payment under the Fireman's Fund policy for asbestos personal injury to the Trust and it would reduce it by \$6 million, yes, I have a concern.

BY MR. PLEVIN:

**Q. And I am sure this has been established on the record long before I came here, but let me just ask this question for foundational purposes.**

**You are an attorney, Mr. Austern?**

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1 A. Yes.

2 **Q. And you have practiced law**  
3 **for how many years?**

4 A. 45.

5 MR. PLEVIN: Thank you. I  
6 have no further questions.

7 MR. CALOGERO: I have no  
8 questions.

9 MR. WISLER: Maryland  
10 Casualty has no questions.

11 MR. GUY: Are there any  
12 insurers on the phone who have  
13 questions?

14 Scotts? BNSF? Do you have  
15 any questions?

16 MS. COBB: Yes. This is  
17 Tiffany Cobb on behalf of The  
18 Scotts Company, LLC, with Vorys,  
19 Sater, Seymour and Pease. Can you  
20 hear me?

21 MR. GUY: Yes. Hi, Tiffany.

22 - - -

23 EXAMINATION

24 - - -

1 **who specifically do you view as your**  
2 **punitive clients?**

3 A. Future claimants.

4 **Q. Okay. And in your capacity**  
5 **as the FCR then, do you owe a fiduciary**  
6 **duty to asbestos PI claimants as defined**  
7 **in the Plan who hold future demands**  
8 **against any entity that is addressed in**  
9 **the definition of an asbestos PI**  
10 **claimant?**

11 A. Can you repeat the last part  
12 of that. Against whom?

13 **Q. Sure. Against any entity**  
14 **that is addressed in the definition of**  
15 **asbestos PI claimant?**

16 A. Yes.

17 **Q. In your capacity as the FCR,**  
18 **do you owe a fiduciary duty to indirect**  
19 **PI Trust claimants who hold future**  
20 **demands against the Debtors?**

21 A. Yes.

22 **Q. In your capacity as the FCR,**  
23 **do you owe a fiduciary duty to**  
24 **insurance-related claimants who hold**

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1 BY MS. COBB:

2 **Q. Mr. Austern, in your**  
3 **capacity as the Asbestos PI Future**  
4 **Claimants' Representative, what fiduciary**  
5 **duties do you owe?**

6 MR. GUY: Tiffany, we  
7 covered that earlier in the  
8 deposition. Were you listening  
9 in?

10 MS. COBB: I was.

11 MR. GUY: I just don't want  
12 to have a lot of duplicity in the  
13 questioning. I will allow this  
14 one.

15 THE WITNESS: I have a  
16 fiduciary duty to future  
17 claimants.

18 BY MS. COBB:

19 **Q. But what are the duties?**

20 A. Essentially to make sure  
21 there is sufficient funds, that when they  
22 file claims they will be treated the same  
23 or similarly to present claimants.

24 **Q. In your capacity as the FCR,**

1 **future demands against any settled**  
2 **insurance company?**

3 A. I think I would have to go  
4 back and look at the definition of those  
5 people.

6 **Q. Okay. Then let's do that.**  
7 **If you would, please, look at Exhibit-5**  
8 **which is the TDP, and if you would please**  
9 **look at Section 5.12.**

10 A. I am looking at it, but give  
11 me a moment.

12 **Q. Sure.**

13 A. Okay. What was the  
14 question?

15 **Q. In your capacity as the FCR,**  
16 **do you owe a fiduciary duty to**  
17 **insurance-related claimants who hold**  
18 **future demands against any settled**  
19 **insurance companies?**

20 A. I don't know. I would have  
21 to think about that. I realize they  
22 could be indirect claimants, at least I  
23 think they could be indirect claimants.  
24 So I would have to think about that. I

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Page 240

1 During any Plan negotiations  
2 in which you were involved which led to  
3 the present Plan of Reorganization, going  
4 back to 2004, was property damage  
5 discussed, including ZAI?

6 MS. BAER: Objection. This  
7 goes into discussions with Plan  
8 negotiations which Plan proponents  
9 have already agreed is beyond the  
10 inquiry of what this witness can  
11 testify about.

12 MR. LIESEMER: The ACC joins  
13 in the objection.

14 MR. GUY: Dan, I am sorry.  
15 I have to agree with them. The  
16 answer to this question will  
17 necessarily reveal substance of  
18 communications.

19 MR. SPEIGHTS: And I  
20 understand that, and I am asking  
21 simply for a yes or no answer as  
22 to was property damage discussed  
23 in his presence. You have not yet  
1 instructed him not to answer. I

1 claimant may have no other source of  
2 exposure?

3 A. If by source of exposure,  
4 you mean nobody else to recover from, the  
5 answer is yes, it could.

6 Q. I am not sure what you mean  
7 by nobody else to recover from. There  
8 may be another source of exposure. Or  
9 are you saying if everybody else was  
10 broke, then that would place them in the  
11 same category?

12 A. Well, I haven't thought  
13 about if somebody -- well, I will give  
14 you an initial reaction. I think if  
15 everyone else is broke, then, yes, they  
16 would be entitled to a greater payment  
17 because there was no one else to recover  
18 from.

19 MR. SPEIGHTS: Mr. Austern,  
20 that's all I have for you at this  
21 time. For the record, I certainly  
22 wish to reserve my right to  
23 question Mr. Austern when I am  
24 able to question him concerning

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1 am not sure what your position is  
2 on that.

3 MR. GUY: I am going to  
4 instruct the witness not to answer  
5 because I don't see how he can  
6 answer that without revealing the  
7 substantive communications either  
8 with a yes or a no answer, i.e.  
9 they took place.

10 BY MR. SPEIGHTS:

11 Q. Mr. Austern, is there any  
12 difference in the amount paid to a  
13 mesothelioma victim from a sole exposure  
14 to Libby vermiculite and from  
15 mesothelioma victim who was exposed to  
16 Grace and other products as a part of  
17 general construction trade?

18 A. If the scheduled value is  
19 the same. If somebody seeks individual  
20 review, it could result in a different  
21 number.

22 Q. And, among other reasons,  
23 could it result in a different number  
24 because in many instances, the Libby

1 the negotiations which led to the  
2 proposed Plan insofar as property  
3 damage is concerned and on the  
4 other subjects that he was  
5 instructed not to respond to.

6 Have a nice weekend,  
7 Mr. Austern.

8 THE WITNESS: Thank you,  
9 Mr. Speights.

10 MR. GUY: I think, for the  
11 record, the only thing that  
12 Mr. Austern is being instructed  
13 not to answer your questions on  
14 were with regard to the  
15 negotiations. The transcript will  
16 say what it says.

17 Is there any other party  
18 that would like to ask questions  
19 of Mr. Austern?

20 MR. BROWN: I have one.

21 MR. HARRIS: This is Daniel  
22 Harris for the Unsecured  
23 Creditors' Committee. I don't  
24 have any questions for

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1 Mr. Austern, but I would like to  
2 read a statement into the record,  
3 if that's okay.

4 As counsel for the  
5 Creditors' Committee that Plan  
6 proponents have previously  
7 discussed and agreed the  
8 Creditors' Committee may seek a  
9 subsequent deposition of  
10 Mr. Austern or any other person or  
11 persons solely in connection with  
12 Plan feasibility issues. Thank  
13 you.

14 MR. GUY: Mr. Brown.

15 - - -

16 EXAMINATION

17 - - -

18 BY MR. BROWN:

19 Q. Mr. Austern, I have a few  
20 follow-up questions mainly to what  
21 Mr. Cohn questioned you about.

22 I think one of the documents  
23 that the Libby claimants' counsel handed  
4 you was an 8-K. I don't recall the name

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1 were any of the Debtors' insurers  
2 consulted about any term of this Term  
3 Sheet prior to April 6, 2008?

4 A. Well, I didn't consult with  
5 them, so I don't know. I did not consult  
6 with them.

7 Q. Are you aware of anyone else  
8 consulting with them?

9 A. No.

10 Q. To your knowledge, did any  
11 of the Debtors' insurers consent to any  
12 term in the Term Sheet prior to April 6,  
13 2008?

14 A. Not that I know of.

15 Q. Now, the initial Joint Plan  
16 was filed in September of 2008, correct?

17 A. Yes.

18 Q. Would I be correct in  
19 assuming that between April 6, 2008 and  
20 September 2008 that the Plan proponents  
21 were working on the terms of the Plan and  
22 Plan documents?

23 A. I was, and I know others  
24 were.

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1 of it. Do you have it there?

2 A. I have it here. I have it.

3 Q. Okay. And attached to that  
4 8-K there is a Term Sheet, correct?

5 A. Yes.

6 Q. And I believe your testimony  
7 was earlier that you have seen this Term  
8 Sheet but some other iteration of it; is  
9 that correct?

10 A. Yes.

11 Q. Not in the form of an  
12 attachment to an 8-K?

13 A. Oh, no. I meant I have seen  
14 a printed version of this.

15 Q. Okay. But, in substance,  
16 it's the same document as what is  
17 attached to the 8-K?

18 A. Yes.

19 Q. Okay. You will agree with  
20 me, will you not, that the Term Sheet is  
21 dated April 6, 2008?

22 A. If you will tell me -- yes,  
23 it is.

24 Q. Okay. To your knowledge,

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1 Q. Okay. And would I also be  
2 correct that in that time period the Plan  
3 proponents and their counsel were  
4 drafting Plan documents?

5 A. I know my counsel was.

6 Q. In that time frame, April 6,  
7 2008 to September 2008, to your  
8 knowledge, were any of the Debtors  
9 insurers' consulted about any of the  
10 terms in the Plan or Plan documents?

11 A. I do not know of any  
12 consultations that took place.

13 Q. Okay. To your knowledge,  
14 were any of the Debtors insurers'  
15 consented about any term in the Plan or  
16 Plan documents in that time frame?

17 A. Well, having not been  
18 consulted, I would be surprised if they  
19 consented, but I don't know if they  
20 consented.

21 Q. All right. Now, in your  
22 prior testimony, in answer to one of  
23 Mr. Cohn's questions, you indicated that  
24 you were aware of circumstances in which

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1 plaintiff's personal injury attorneys had  
2 waived their fees?

3 A. Yes.

4 Q. Putting those circumstances  
5 aside, do you have an understanding as to  
6 what the customary contingency fee  
7 arrangement is for plaintiffs' asbestos  
8 personal injury lawyers?

9 MR. LIESEMER: Objection to  
10 the form. No foundation.

11 THE WITNESS: I know what it  
12 is in the Manville Trust because  
13 the Manville Trust dictates what  
14 it will be.

15 BY MR. BROWN:

16 Q. Okay.

17 A. Putting that aside, I think  
18 it depends on the case. I am familiar  
19 with the fact, for instance, that medical  
20 malpractice attorneys charge a somewhat  
21 higher contingency fee than others do. I  
22 am not sure I know what the standard fee  
23 is for asbestos personal injury.

4 Q. Do you have any idea what

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1 Plan?

2 A. Not that I know of.

3 Q. Why?

4 A. I don't know.

5 Q. Are you aware of other  
6 asbestos trusts where there is a cap with  
7 respect to contingency fees that can be  
8 paid to plaintiffs lawyers?

9 A. You did say asbestos trusts?

10 Q. Yes.

11 A. I do not know of any other  
12 asbestos trust that has a cap.

13 Q. Focusing for a moment on the  
14 CE Trust, are the TAC members paid for  
15 their services as TAC members?

16 A. You know, I don't remember.  
17 I know there is a provision to pay their  
18 expenses. I can't remember if they are  
19 paid. I just know I am paid.

20 Q. Well, that's important.

21 How about with respect to  
22 this Trust in the Grace bankruptcy? Do  
23 you know whether the TAC members will be  
24 paid in any fashion for their services

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1 Mr. Cooney's firm charges by way of  
2 contingency fee?

3 A. No.

4 Q. Mr. Weitz?

5 A. No.

6 Q. Mr. Rice?

7 A. No.

8 Q. Mr. Budd?

9 A. No.

10 Q. Anyone?

11 A. No.

12 Q. You mentioned that there is  
13 a cap -- I am not sure you used the term  
14 "cap" -- there is a fee in the Manville  
15 Trust Agreement?

16 A. Yes.

17 Q. Is it a cap?

18 A. No -- it is a cap. It says  
19 the fee cannot exceed 5 percent.

20 Q. Okay. How did that term  
21 come about in the Manville Trust?

22 A. In words of one syllable,  
23 Judge Weinstein insisted on it.

24 Q. Is there a cap under this

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1 TAC members?

2 A. Do you mean other than  
3 expenses?

4 Q. Yes.

5 A. And I don't recall any  
6 specific provision.

7 Q. Okay. I found it.

8 A. Which page?

9 Q. Page 32.

10 A. Are we in the Plan?

11 Q. No. We are in the Trust  
12 Agreement, page 32 of the Trust  
13 Agreement.

14 A. I am sorry. Just a minute.  
15 What page?

16 Q. 32, Section 5.6.

17 A. I seem to have an agreement  
18 that's out of pagination. Just a moment.

19 Yes. 5.6, yes, they are  
20 paid -- I stand corrected -- an hourly  
21 rate.

22 Q. All right. Do you have any  
23 understanding today as to what the hourly  
24 rate will be for the members of the TAC

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1 if the Plan is confirmed?

2 A. No, I don't.

3 Q. Do you have any view as to  
4 what the hourly rate would be if the Plan  
5 is confirmed?

6 A. I confess, Mr. Brown, having  
7 forgotten that they are entitled to an  
8 hourly rate, I would have to think about  
9 that. But I, at this point, have no  
10 view.

11 Q. Okay. Do you have a view as  
12 to whether they should be paid that  
13 hourly rate above and beyond whatever  
14 fees they get from their individual  
15 clients who recover from the Trust?

16 A. If Section 5.6 gives them  
17 the right to get the hourly rate, I think  
18 they should get the hourly rate.

19 MR. BROWN: I think that's  
20 all. Thank you, Mr. Austern.

21 MR. CANDON: I have one  
22 follow-up question.

23 MR. GUY: Sure. Go ahead.

24 - - -

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1 CERTIFICATE

2  
3  
4 I HEREBY CERTIFY that the witness  
5 was duly sworn by me and that the  
6 deposition is a true record of the  
7 testimony given by the witness.  
8  
9  
10

11  
12  
13 \_\_\_\_\_  
14 Lori A. Zabielski  
15 Registered Professional Reporter  
16 Dated: MAY 17, 2009  
17  
18

19  
20 (The foregoing certification  
21 of this transcript does not apply to any  
22 reproduction of the same by any means,  
23 unless under the direct control and/or  
24 supervision of the certifying reporter.)

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1 EXAMINATION

2 - - -

3 BY MR. CANDON:

4 Q. Mr. Austern, you had  
5 mentioned that you reviewed Mr. Biggs'  
6 estimation report, and the figure was  
7 somewhere exactly between, you said, 3  
8 and 5 billion?

9 A. Let me explain. There was a  
10 follow-up letter to the report. The  
11 report I believe said 3.8, and it was  
12 reduced to 3.6 because of the  
13 mathematical error.

14 Q. Did she provide a separate  
15 estimate for Libby claims?

16 A. No, she did not.

17 MR. CANDON: Okay. That's  
18 all I have. Thank you.

19 MR. GUY: Okay. We are  
20 done.

21 (The deposition concluded at  
22 3:27 p.m.)  
23  
24

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1 INSTRUCTIONS TO WITNESS

2  
3 Please read your deposition over  
4 carefully and make any necessary  
5 corrections. You should state the reason  
6 in the appropriate space on the errata  
7 sheet for any corrections that are made.

8 After doing so, please sign the  
9 errata sheet and date it.

10 You are signing same subject to the  
11 changes you have noted on the errata  
12 sheet, which will be attached to your  
13 deposition.

14 It is imperative that you return  
15 the original errata sheet to the deposing  
16 attorney within thirty (30) days of  
17 receipt of the deposition transcript by  
18 you. If you fail to do so, the  
19 deposition transcript may be deemed to be  
20 accurate and may be used in court.  
21  
22  
23  
24